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In the Supreme Court of the United States

OCTOBER TERM, 1978

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

YESHIVA UNIVERSITY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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YESHIVA UNIVERSITY

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The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, *infra*, 1a-42a) is reported at 582 F.2d 686. The Board's decision and order (Pet. App. C, *infra*, 45a-62a) are reported at 231 N.L.R.B. No. 98. Its decision and direction of election in the underlying rep-

resentation proceeding (Pet. App. D, *infra*, 63a-79a) are reported at 221 N.L.R.B. 1053.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, *infra*, 43a-44a) was entered on July 31, 1978. On October 18, 1978, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to November 28, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether faculty members who participate in decision-making regarding the hiring, compensation, and promotion of the faculty and the academic standards of the university are managerial or supervisory employees excluded from the protections of the National Labor Relations Act.

STATUTE INVOLVED

The relevant statutory provisions are set forth in App. E, *infra*, 80a-81a.

STATEMENT

1. In 1974, the Yeshiva University Faculty Association (the Union) filed a representation petition with the Board seeking certification as the bargaining agent of the full-time faculty members of most of the schools at Yeshiva University (the University) (App.

D, *infra*, 65a-66a).[1] A representation hearing was held at which it was established that the University is a private educational institution chartered by the State of New York, with facilities located on four campuses in New York City (App. D, *infra*, 64a). There are approximately 1,200 full-time and 340 part-time undergraduates, as well as 336 full-time and 380 part-time graduate students, enrolled in the schools of the University involved in this proceeding (App. A, *infra*, 5a-6a).[2] The University has approximately 209 full-time and 150 part-time faculty members (U. Ex. 100-101, 110-111, 115-116, 118-119, 123-124, 135, 137, 139-140, 144-145).[3]

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[1] The Union did not seek to represent the faculty of the Albert Einstein College of Medicine, the Sue Golding Graduate School of Medical Sciences, the Yeshiva High School, or any of the theological programs affiliated with the University (App. D, *infra*, 65a-66a). (At the time of the Union's petition, Yeshiva University did not have a law school.)

[2] The schools involved are: Yeshiva College ("Yeshiva"), Stern College for Women ("Stern"), Teachers Institute for Women ("Teachers"), the Erna Michael College of Hebraic Studies ("Erna Michael"), the James Striar School of General Jewish Studies ("James Striar"), the Yeshiva Program, the Bernard Revel Graduate School ("Revel"), the Wurzweiler School of Social Work ("Wurzweiler"), the Ferkhauf Graduate School of Humanities and Social Sciences ("Ferkauf"), and the Belfer Graduate School of Science ("Belfer") (App. D, *infra*, 64a n.1). These schools are referred to collectively as "the University" unless otherwise specified.

[3] "U. Ex." refers to the University's exhibits in the representation proceeding; "Tr." refers to the transcript in that proceeding; and "A." refers to the joint appendix filed in the court of appeals.

The ultimate policy and decision-making body at the University is the Board of Trustees, on which no faculty members sit (A. 63, 1310, 1498). The University President, who is the chief executive officer of the University, is a member of the Board of Trustees (A. 63, 357, 1498). The next stratum of the University administration consists of the Vice-Presidents for Academic Affairs, Business Affairs, and Student Affairs (A. 36-37, 63, 184-185). Administrative officers with more limited areas of responsibility include the Registrar, Bursar, and Director of Admissions (A. 1519). The chief administrative officer of each of the schools is the Dean, who serves as "the liaison officer between the programatic activities of the school and other schools [within the University] and the central administration" (A. 141), and reports to the academic Vice-President and President (Tr. 155).

The Executive Council of the University, whose members are appointed by the President with the concurrence of the Board of Trustees, consists of the deans and directors of the various schools, and the directors of various administrative divisions (A. 66). It normally meets twice a month and has within its purview "all of the academic and administrative problems of the university." It is, however, "primarily a recommending body," recommending policies and procedures "to the president who then issues directives." (A. 67.)

The administration also has various committees. For example, the budget committee, which is ap-

pointed by the President and at the time of the Board hearing consisted of the Vice-President for Business Affairs, the Registrar, and the Dean of Erna Michael, formulates the budget for each component school and the institution as a whole (A. 190; Tr. 905-906). Financial guidelines of university-wide application—such as freezes on hiring of non-academic personnel and on faculty salaries and budgetary restrictions that were imposed in the early 1970's due to a University fiscal crisis—are formulated by the budget committee, submitted to the Executive Council and then to the President for final approval (A. 190-203; Tr. 913-918). The budget for individual schools (or departments in the larger schools) is drafted initially by the dean of the school or the department chairman who, after meetings with the budget committee, submits the draft to the Vice-President for Business Affairs, who reviews it with the budget committee and then submits it to the President for approval (Tr. 604, 912).

Policies and procedures of university-wide application are set forth in the Faculty Handbook (A. 1491-1509). When changes in the Handbook are to be made, faculty committees at the various schools are "asked to make comments" to the appropriate University committee. Final determination of the Handbook's contents is made by the Executive Council, with the approval of the President and the Board of Trustees. (A. 181-182.) University-wide policies ap-

plicable to the full-time faculty[4] at all schools govern the required teaching load, and are determined by the Executive Council (A. 41). There also is a centrally determined faculty salary scale,[5] and university-wide tenure, sabbatical, and mandatory retirement policies (A. 99, 102, 104, 1501-1506). The health and disability plans, the group life insurance plan, and the retirement income plan which the University offers to faculty members are university-wide in application (A. 1507-1508).

Faculty input on matters of university-wide policy is secured through the academic councils—the Council of Undergraduate Schools and the Council of Graduate Schools—which advise the President. These bodies consist of student and faculty representatives elected from their constituent divisions, and appointed University officers (A. 68-70). Their mission is "to enable * * * faculty and students and university administrators * * * to be concerned with the problems that they all face together * * * [and which] arise anywhere in the university" (A. 71).

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[4] All references are to the full-time faculty unless otherwise noted. Full-time faculty members are required to devote their time exclusively to the University. Permission for outside work can be given only by the President after approval of the dean is obtained. (A. 40-41) .

[5] In schools with a pre-set salary scale, each year faculty members advance a step along the scale based upon rank and years of service, receiving whatever increase the scale allows (A. 210). For schools that have no prescribed scale and for faculty members who are at the top of the scale, the budget committee determines the appropriate raise in salary, if any (A. 211-214).

There is also a "university-wide grievance committee"—the University Faculty Review Committee—which consists of eight tenured faculty members elected from the various schools. Its function is to review grievances pertaining to promotion (A. 76); its authority is limited to making recommendations to the dean or to the President (A. 1522-1524).

The University President appoints all full-time teaching personnel, receiving recommendations from the deans and the Vice-Presidents for Academic Affairs and Business Affairs. Dr. Joshua Fishman, Vice-President for Academic Affairs, explained the process as follows (A. 132-133):

> The deans are in the pivotal position in connection with hiring. The programs with which they are in touch express needs for new faculty to them. The university administration lets them know about the budgetary possibilities. The deans therefore, together with each other and with the people in the programs try to translate those possibilities into what should be done.
>
> Some of it could be used for full time faculty or for part time faculty or for other acquisitions.
>
> At any rate, this kind of discussion goes back and forth and normally, depending on the size of a school, some schools are really so small that you would consider them departments, and, therefore, the dean is in touch with the whole faculty and, therefore, he doesn't need anyone else to recommend this to him. But in a larger school it would be the chairman who mostly works with the dean and, therefore, the program faculty of that department or the various departments involved in

> the program that are communicating with the chairman, he communicates with the dean.[6]
>
> The dean is in touch with other deans.
>
> In other words, it's a pooling of information which is fed to the dean and which is then fed to me and to Dr. Sokol [Vice-President for Business Affairs] and so forth, to the president.

Dr. Sokol, Vice-President for Business Affairs, stated that his "involvement relates to the staffing of individual schools with regard to the fiscal consequences of appointments and * * * expanding or contracting the number or the level of the faculty involved" (A. 187). He added that, unless overruled by the President, he had "an effective veto" over salary recommendations which were inconsistent with University policy (A. 216).[7]

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[6] Belfer, Ferkauf, Revel and James Striar are organized into departments and their faculties elect department chairmen (A. 250, 712, 822-823, 1108, 1177, 1235). Yeshiva's faculty is broken down into divisions, and each division elects a division chairman. In addition, the most senior professor in each academic subject area at Yeshiva and Erna Michael represents the other professors in that area (A. 404, 440, 449). The department chairmen at Stern are recommended by the dean for appointment by the President, but they act on behalf of the faculty (A. 311). There are no department chairmen at Wurzweiler, Teachers, or the Yeshiva Program, where the faculty acts as a body (A. 722, 916).

[7] However, Dr. Sokol has never had to exercise his veto power because, "through the process of discussion and cooperation," salary requests have changed significantly from the time they were originally submitted to him and therefore "there was a general consensus and agreement that the appointment could be consummated" (A. 216).

Recommendations for promotions proceed through a similar process. Vice-President Fishman explained that "[a]ll recommendations for promotions finally wind up on my desk. They start out normally in the faculty member's own department where some consensus is reached that he should be recommended for promotion. * * * Normally that then is communicated to the promotion committee of the school, and if that recommendation is * * * acceptable to them, they so recommend to the dean who normally himself has to * * * approve that recommendation" (A. 88). The recommendation then goes to Vice-President Fishman, who evaluates it on behalf of the President in terms both of the school's requirements for promotion and his independent appraisal of the quality of the candidate's scholarship (A. 89-92). Without Fishman's approval the candidate could not be promoted (A. 92). Fishman added that the deans frequently discuss potential recommendations with him informally before they are formally submitted "so that they won't run into last minute questions, and so that they don't have to be turned down" (A. 90).[8]

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[8] Faculty input into promotion decisions varies from school to school. At Stern, for example, an elected faculty Promotions Committee (which includes some department chairmen) solicits recommendations from the candidates' chairmen who, in turn, often consult the department's faculty (A. 328-329, 358, 362-363). The Committee then submits a recommendation to the administration (A. 330). At Yeshiva, an advisory council of the elected division chairmen makes recommendations concerning promotions to the President (A. 447, 442-443). Faculty members desiring promotions submit a written request to the council through their division chairman,

Full-time faculty members at the University are entitled to be considered for tenure after serving a certain number of years (A. 99). Vice-President Fishman testified that, at the time when tenure is considered (A. 99):

> The deans will first call and come and we will discuss the question, and it will normally be decided in terms of the financial capacity of the university to carry another tenured commitment, and the impact on that department * * * .

He explained that, in addition to the particular school's concern for intra-departmental balance, he had to consider "the school wide balance of tenured versus untenured faculty" and "the whole fiscal side of * * * university planning" (A. 100).[9] Fishman also stated that, while he attempts to reach agreement with the

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who, in turn, "by good democratic procedures [tries] to convince the other members * * * that they should vote for such a promotion" (A. 443).

[9] Input from the faculty regarding tenure decisions varies among the schools. At Ferkauf, department members evaluate candidates for tenure and communicate their written findings through the chairman to the dean, who convenes a council of all tenured faculty members (A. 1185-1186). A committee of that council screens the department's evaluations and makes a recommendation to the full council, which votes by secret ballot and transmits its recommendation to the dean (A. 1189-1190). Similarly, at Belfer, tenure recommendations are made by the entire department and are referred to the dean for ultimate decision by the President (A. 838-839). At Stern, the dean makes his own recommendation but also solicits one from the candidate's department chairman; both recommendations are sent to the President, who makes an independent evaluation and decision (A. 358-359).

deans in making tenure decisions and has been able to do so, in the absence of agreement he has final authority to deny tenure (*ibid.*).

Tuition levels are determined through a similar process. Vice-President Sokol, in charge of Business Affairs, testified that (Tr. 934-935):

> Periodically at my direction or at his own initiative, the University director of finances, analyzes the tuition structure and compares it with those tuition structures of other universities and meets with the dean of the school and submits a joint recommendation as to whether the charge should be maintained or revised in some way.
>
> * * * *
>
> That recommendation is made to me. I in turn submit that recommendation to the university executive council which either recommends it, modifies it and then it is submitted to the president for his approval with my recommendation.

Faculty input can influence the tuition recommendation. For example, the objection of a department chairman that a tuition increase would cause a decline in enrollment due to "the competitive nature of the program" was forwarded by the dean to Vice-President Sokol, who decided against the tuition increase (A. 829-830). Faculty opinion as to the proper amount of a proposed tuition increase also has influenced the dean's recommendation to Sokol (A. 932).

The various schools and divisions at the University are given wide latitude to determine their own curriculum, grading system, admissions and matriculation standards, and course schedules (A. 280-294,

297, 299-300, 413, 511, 540). At several schools the faculty meets periodically to review the curriculum, recommend changes to the dean, and allocate course offerings (A. 280-281, 421-422, 628-630, 632, 553-554, 825, 930). Budgetary control, however, is centralized in the University administration (A. 190-217, 1024-1025). Vice-President Fishman noted that "budgetarilly [the dean] doesn't have the same significant role as he would programatically" (A. 141; Tr. 757). Decisions about the academic load a student may carry are determined jointly by the school and the Registrar (A. 1160).

Faculty members in each school meet formally and informally to discuss and pass resolutions on matters of professional and institutional concern (A. 266-268, 414-418, 541-542, 545-546, 665-666, 810-811). At Stern, Yeshiva, Belfer, and Ferkauf, the faculty meets four times each year pursuant to written bylaws and/or a constitution approved by the President (A. 268, 489-490, 806-807, 1143-1144). At other schools, the faculty meets when convened by the dean or director. Faculty meetings generally are chaired by the dean or director (A. 415, 546).

Most schools have faculty and faculty-student committees concerned with curriculum, promotions, admissions, and grading practices (A. 80, 306-308, 420, 428, 438-439).[10] Faculty welfare committees at most

[10] No one contended before the Board or the court of appeals that the faculty has managerial responsibility for matters of University administration such as procurement of equipment and supplies, building and grounds construction and upkeep, or provision and maintenance of housing and food services.

schools negotiate with the University administration on behalf of the full-time faculty concerning increases in the salary scale and other terms of employment (A. 208-209, 249a, 340, 363-365, 543, 899, 904-905, 1017, 1018-1023, 1236-1239, 1259-1264, 1312-1313). Thus, the University's decision in 1974 to give faculty members at the highest pay level a 5% raise was discussed in advance with the welfare committees (Tr. 929-930).

2. Based on the foregoing facts, the Board found the full-time faculty members at the University to be an appropriate bargaining unit, and directed an election in that unit (App. D, *infra*, 63a-79a).[11] In so doing, the Board rejected the University's contention that "no faculty bargaining unit can be appropriate because all faculty members—by virtue of their group participation in faculty governance—are supervisory or managerial and are, thereby, not employees within the meaning of the Act" (*id.* at 67a). The Board concluded that the "role and authority of the faculty herein with respect to hiring, promotion, salary increases, the granting of tenure, and other areas of governance are not significantly different" from what they were in prior cases in which it had found university faculty

[11] The bargaining unit embraces all full-time faculty members, including department chairmen, but excluding deans, acting deans, directors, and all other administrative, supervisory, or support personnel (App. D, *infra*, 79a).

members to be employees (*id.* at 68a).[12] The Board explained (*ibid.*):

> At Yeshiva University, faculty participation in collegial decision making is on a collective rather than individual basis, it is exercised in the faculty's own interest rather than "in the interest of the employer," and final authority rests with the board of trustees. As in the earlier decisions, we find that the faculty members are professional employees under the Act who are entitled to vote for or against collective-bargaining representation.

The Union won the election "by a substantial margin" and was certified by the Board (App. A, *infra*, 4a). The University refused to bargain, contesting the validity of certification. The Board, upon charges filed by the Union, found that the University had violated Section 8(a)(5) and (1) of the Act, and issued a bargaining order (App. C, *infra*, 45a-60a).

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[12] See *C. W. Post Center of Long Island University*, 189 N.L.R.B. 904 (1971); *Fordham University Law School*, 193 N.L.R.B. 134 (1971); *Adelphi University*, 195 N.L.R.B. 639 (1972); *New York University*, 205 N.L.R.B. 4; *University of Miami*, 213 N.L.R.B. 634 (1974); *Northeastern University*, 218 N.L.R.B. 247 (1975).

In those cases, the Board found that, although faculty members had a significant voice in determining academic policies and recommending decisions on appointments, promotions, and tenure, they did not have ultimate decision-making authority. Nor did they represent the position of management as opposed to their own position. Finally, the Board noted in these cases that faculty members exercised their authority and influence as a group, and not individually.

3. The court of appeals denied enforcement of the Board's order, concluding that "the full-time faculty has managerial status" (App. A, *infra*, 42a). The court agreed with the Board that the faculty members are professional employees under Section 2(12) of the Act, 29 U.S.C. 152(12), and that their "attributes of professionalism" do not "characterize them as managerial or supervisory" (*id. at* 26a). However, the court concluded (*id.* at 27a):

> [T]he issue as we perceive it in this case involves not simply the professor's exercise of discretion in conducting the courses he is employed to teach. Rather, the issue here is the extensive control of Yeshiva's faculty over what courses are taught in the institution, who teaches them, the number of teaching hours required of the faculty, and the rank, salary, and tenure status of other faculty members. We are further concerned by the crucial role of the full-time faculty in determining other central policies of the institution including, *inter alia*, the curriculum, admissions and graduation requirements, tuition, and in one instance, even the situs of a school. When faculty members have such power—as the board indicates they do at Yeshiva—they no longer are simply exercising individual professional expertise. They are, in effect, substantially and pervasively operating the enterprise.

The court attached no significance to the fact that the faculty members exercised their authority collectively rather than individually, reasoning that they could be "managerial employees" even though they exercised authority as a group (*id.* at 28a-32a). The

court also rejected the Board's contention that the faculty exercised their authority on their own behalf and not that of the University. The Court stated that, "even assuming that the faculty's determinations on personnel, curriculum, admissions, grading, graduation requirements and other policy issues were motivated by the faculty's best interests, the fact that the administration and Board of Trustees of Yeshiva so rarely interfered in the faculty decisions indicates that the interests of the faculty and of the University were almost always coextensive" (App. A, *infra*, 33a). Finally, the court concluded that the existence of the Board of Trustees with ultimate authority did not deprive the faculty members of their managerial or supervisory status, pointing out that business corporations have boards of directors with ultimate authority as well as numerous managerial and supervisory employees (App. A, *infra*, 37a-39a).

REASONS FOR GRANTING THE PETITION

1. The Board's conclusion that the involvement of the faculty in the decision-making process of the university with respect to such matters as the hiring, promotion, and tenure of one another and the adoption of academic standards does not make them supervisors or managers exempt from the Act is a reasonable interpretation of the statute, and thus should have been upheld by the court of appeals. This question is a recurrent one that is important to the administration of the Act. Review by this Court therefore is warranted.

a. In the Taft-Hartley amendments of 1947, Congress expressly excluded supervisors from the coverage of the National Labor Relations Act.[13] Congress excluded supervisors from the Act in response to the decision in *Packard Motor Co.* v. *NLRB*, 330 U.S. 485 (1947), which held that foremen were employees with bargaining rights protected under the Act. This exclusion reflected Congress' judgment that management was entitled to the undivided loyalty of "supervisory personnel, traditionally regarded as part of management." S. Rep. No. 105, 80th Cong., 1st Sess. 3-5 (1947); see also H.R. Rep. No. 245, 80th Cong., 1st Sess. 13-14 (1947).

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[13] The definition of "employee" contained in Section 2(3) of the Act, 29 U.S.C. 152(3), excludes "any individual employed as a supervisor." Section 2(11) of the Act, 29 U.S.C. 152(11), defines the term "supervisor" as:

> [A]ny individual having authority, *in the interest of the employer*, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." [Emphasis added.]

Because the definition provides that one or more of the enumerated powers must be exercised "in the interest of the employer," persons who exercise such power in their own interest are not supervisors under the Act. See *Stop & Shop Companies, Inc.* v. *NLRB*, 548 F. 2d 17, 19 (1st Cir. 1977); *NLRB* v. *Wentworth Institute*, 515 F.2d 550, 557 (1st Cir. 1975); *International Ladies' Garment Workers' Union* v. *NLRB*, 339 F.2d 116, 121 (2nd Cir. 1964); *International Union of United Brewery* v. *NLRB (Gulf Bottlers, Inc.)*, 298 F.2d 297, 304 (D.C. Cir. 1961), cert. denied, 369 U.S. 843 (1962).

The Act contains no express exclusion of managerial employees. However, in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 286-287 (1974), this Court concluded that "managerial employees"—defined as those who " 'formulate and effectuate management policies by expressing and making operative the decisions of their employer' "—are also excluded from the Act's coverage. *Id.* at 288, quoting *Palace Laundry Dry Cleaning*, 75 N.L.R.B. 320, 323 n.4 (1947). The Court also noted the rationale for exclusion of managerial employees summarized in *Retail Clerks International Ass'n* v. *NLRB*, 366 F.2d 642, 645 (D.C. Cir. 1966) (Burger, J.), cert. denied, 386 U.S. 1017 (1967)—that "Congress intended to exclude from the protection of the Act those who comprised a part of 'management' or were allied with it on the theory that they were the one[s] from whom the workers needed protection." 416 U.S. at 288-289 n.16.

While Congress has excluded supervisors and managerial employees from the coverage of the Act, it has expressly included "professional employees." [14] But

[14] Section 2(12) of the Act, 29 U.S.C. 152(12), defines the term "professional employee" to include:

> (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; * * *

Section 9(b)(1), 29 U.S.C. 159(b)(1), precludes the Board from placing professional employees in the same unit with employees who are not professional employees "unless a majority of such professional employees vote for inclusion in such unit."

the line separating supervisory and managerial employees from professional employees is not clear and bright. [15] Where professional employees in fact perform managerial or supervisory functions, they are properly excluded from the Act's protection. Congress has therefore entrusted to the Board the task of determining the status of the employees in question, and its judgment is entitled to considerable deference. See *Marine Engineers* v. *Interlake Steamship Co.*, 370 U.S. 173, 179-180 (1962); *Westinghouse Electric Corp.* v. *NLRB*, 424 F.2d 1151, 1156 (7th Cir., cert. denied, 400 U.S. 831 (1970). See also *American Broadcasting Companies* v. *Writers Guild of America*, No. 76-1121 (June 21, 1978), slip op. 18-21.

[15] During the hearings on the 1947 Taft-Hartley amendments, management representatives argued for inclusion of professional employees in the supervisory exclusion, contending that they were part of management. *Amendments to the National Labor Relations Act: Hearings on H.R. 8, etc. Before the House Comm. on Education and Labor*, 80th Cong., 1st Sess. 1225 (1947). *Labor Relations Program: Hearings on S. 55 & S.J. Res. 22 Before the Senate Comm. on Labor and Public Welfare*, 80th Cong., 1st Sess. 694 (1947). And see Finkin, *The Supervisory Status of Professional Employees*, 45 Fordham L. Rev. 805, 807 (1977).

b. The university governance structure conforms neither to the typical industrial or commercial model,[16] nor to the medieval model of true collegial decision-making in which complete power and authority is vested in a group of peers.[17] Rather, as the facts in this case show, there are at least two authority systems built into the university's formal structure: "One is the *bureaucratic* network, with formal chains of command running from the trustees down to individual faculty members and students. * * * The other authority system is a *professional* network, for at all levels there are formal mechanisms for bringing the expertise of the faculty into the decision-making

[16] As the Board pointed out in *Adelphi University, supra*, 195 N.L.R.B. at 648, "[t]he statutory concept of 'supervisor' grows out of the fact that in [typical commercial organizations] authority is normally delegated from the top of the organizational pyramid in bits and pieces to individual managers and supervisors who in turn direct the work of the larger number of employees at the base of the pyramid." Similarly, Professor Finkin has observed (*The Supervisory Status of Professional Employees, supra*, 45 Fordham L. Rev. at 808):

> The supervisory exemption is founded upon the assumption of bureaucratic managerial structures widely followed in industry. In a bureaucracy the legitimacy of a decision rests ultimately upon the decision-maker's position in the hierarchy. * * * This stands in sharp contrast to the assumption upon which the professions proceed. Lengthy, specialized education gives rise to expertise; it is by resort to professional judgment rather than to hierarchical authority that the legitimacy of a professional decision is to be tested.

[17] See *Adelphi University, supra*, 195 N.L.R.B. at 648; *New York University, supra*, 205 N.L.R.B. at 5.

process." J. Baldridge, *Power and Conflict in the University* 114 (Wiley 1971) (emphasis in original).

Although the faculty of a university may play an important role in devising the curriculum, setting standards for admissions and graduation, and selecting its own members, they are not generally advocating "management's interests in making their decisions, nor are they advised that they are management's representatives in making them." *Adelphi University, supra*, 195 N.L.R.B. at 648. Instead, they are giving the university management—*i.e.*, the board of trustees and the administrative officers—their independent professional judgment on matters of direct concern to both faculty and administration.[18] Moreover, unlike the typical managerial or supervisory

[18] As the Board explained in *General Dynamics Corp.*, 213 N.L.R.B. 851, 857-858 (1974):

> [M]anagerial status is not conferred upon rank-and-file workers, or upon those who perform routinely, but rather is reserved for those in executive-type positions, those who are closely aligned with management as true representatives of management. Work which is based on professional competence necessarily involves a consistent exercise of discretion and judgment, else professionalism would not be involved. Nevertheless, professional employees plainly are not the same as management employees either by definition or in authority, and managerial authority is not vested in professional employees merely by virtue of their professional status, or because work performed in that status may have a bearing on company direction. * * * A lawyer or a certified public accountant working for, or retained by, a company may well cause a change in company direction, or even policy, based on his professional advice alone, which, by itself would not make him managerial.

employee, faculty members act on a collective rather than an individual basis, and are not accountable to the university administration for the acceptability or compatibility with administration policy of their recommendations;[19] rather, they are evaluated on their competence as teachers and researchers.

The basis for the managerial and supervisory exclusions from the Act is management's right to have its managers and supervisors accountable solely to it and not to have their loyalty divided with a union. Because faculty members are not accountable to management for their recommendations on academic standards, faculty selection, and related matters, and are expected to exercise their own independent judgment in this regard, the danger of divided loyalty that Congress sought to avoid by excluding managerial and supervisory employees from the Act does not exist. Neither management nor faculty have any expectation that the faculty will act as "representative[s] of management" (*NLRB* v. *Bell Aerospace*, *supra*, 416 U.S. at 287) in expressing their views and concerns to the administration and participating in university affairs.

c. The court of appeals acknowledged that the University's full-time faculty members are profes-

[19] For example, the university may issue a directive to the deans to limit expenses. As an agent of the administration the dean is expected to attempt to implement that directive. The faculty, on the other hand, although aware of that administration concern, makes its recommendations based on its collective professional judgment of what its department or school requires.

sional employees within the meaning of Section 2(12) of the Act and that certain of their attributes—the faculty member's "authority to determine the content of his course, the method he employs in teaching it, and the evaluation of his students' academic performance"—do not confer supervisory or managerial status (App. A, *infra*, 26a). The court concluded, however, that because the faculty members also play an important role in determining the University's curriculum, admission and graduation requirements, and the rank, salary, and tenure of one another, "they no longer are simply exercising individual professional expertise," but "are, in effect, substantially and pervasively operating the enterprise" (*id.* at 27a). But, as noted on pages 17-22, *supra*, the critical consideration is not whether the University administration has chosen to obtain the faculty's views on many important matters, but rather whether, in carrying out its responsibilities, the faculty is functioning *for* management and therefore is accountable to it for the acceptability of its recommendations.

Mere involvement by the faculty in the decision-making process affecting tenure, promotion, salary, and academic standards is not an indication that the faculty is aligned in interest with management. To the contrary, these are subjects in which faculty-employees have a direct interest of their own because they may concern the terms and conditions of their employment. The Act requires management to negotiate with its employees about subjects which affect their terms and conditions of employment (*Fibreboard Cor-*

poration v. *NLRB*, 379 U.S. 203 (1964)), and it may not logically be inferred that employees are representing the interests of management when they attempt to influence management's decision on such subjects. Nor was the court of appeals warranted in concluding (App. A, *infra*, 36a), contrary to the Board's finding (App. D, *infra*, 68a), that there is no significant divergence of interest between faculty and management. Like any other group of employees, faculty members have an interest in obtaining pay raises and benefits which management may resist. Thus, the faculty at Yeshiva formed "welfare committees" to negotiate with the University concerning the terms and conditions of employment prior to the Union's representation petition. The faculty's strong vote for the union to serve as its bargaining representative in negotiations with the administration is another indication that it perceives its interests as being, at least in part, separate from those of management and as requiring an independent spokesman. See pages 12-13, 14, *supra*.

Similarly misplaced is the court's reliance on the fact that the administration often accepts the faculty's recommendations (App. A, *infra*, 33a-36a). As noted on pages 8-13, *supra*, their agreement often is the result of a continuous process of discussion, informal negotiation, and compromise. The persuasiveness of the faculty, and the respect of the administration for the views of this essential portion of the University's employees, is no ground for concluding that the faculty has acted as management's representative. Rather, it is evidence both of the determination of the

faculty to assert its interests as an employee group regarding the terms and conditions of academic employment and of the recognition by the administration that faculty satisfaction with the University depends upon such participation.

Finally, the court misconceived the Board's purpose in emphasizing the ultimate authority of the University's Trustees. While it is true that "every corporation is ultimately operated by its Board of Directors" (App. A, *infra*, 37a), the Board's reference to the ultimate authority of the Board of Trustees was intended to show only that the university is not merely a "community of scholars," in which ultimate authority rests with the peer group as in the true collegial model. The existence of the Board of Trustees—similar in function to a Board of Directors—shows that there are similarities between the management of the university and that of a typical business corporation. See *Adelphi University*, *supra*, 195 N.L.R.B. at 648; *New York University*, *supra*, 205 N.L.R.B. at 5.

2. The Board first asserted jurisdiction over private universities and colleges in 1970. *Cornell University*, 183 N.L.R.B. 329 (1970).[20] Since that time

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[20] There are more than 1,500 such institutions in the United States today, employing approximately 185,000 persons of professional rank. W. Grant and C. Lind, *1977-1978 Digest of Education Statistics* 101, Table 105 (U.S. Department of Health, Educational Welfare 1978). Approximately 2,400,000 students are enrolled in these institutions. *Id.* at 82, 101, Tables 80, 105. Their annual total revenues exceed 12 billion dollars. *Id.* at 126, Table 125.

the Board has conducted many representation proceedings involving faculty bargaining units at such institutions.[21] The decision of the court of appeals in this case rests on reasoning that would deny the protections of the Act not only to the faculty at Yeshiva, but to the faculty at most other universities and colleges as well.[22] Accordingly, if left standing,

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[21] See, *e.g.*, *Syracuse University Law School*, 204 N.L.R.B. 641 (1973); *University of San Francisco Law School*, 207 N.L.R.B. 12 (1973); *New York University Law School*, 205 N.L.R.B. 4 (1973); *Fairleigh Dickinson University*, 205 N.L.R.B. 673 (1973); *Adelphi University*, 195 N.L.R.B. 639 (1972); *College of Pharmaceutical Services*, 197 N.L.R.B. 959 (1972); *Fordham University Law School*, 193 N.L.R.B. 134 (1971); *Kendall College*, 228 N.L.R.B. 1083 (1977); *Wentworth Institute*, 210 N.L.R.B. 345, enforced, 515 F. 2d 550 (1st Cir. 1975); *Loretto Heights College*, 205 N.L.R.B. 1134 (1973); *Boston University*, 228 N.L.R.B. 1008 (1977), enforced, 575 F. 2d 301 (1st Cir. 1978), petition for cert. pending, No. 78-67.

[22] Although the court of appeals stated that it was addressing itself "solely to the situation at the institution involved in this proceeding" (App. A, *infra*, 22a), the elements of faculty responsibility on which the court relies in finding managerial and/or supervisory status are, as the Board noted in its decision (App. D, *infra*, 68a), essentially the same as those found in other universities.

To the extent that the court of appeals has equated managerial status with mere involvement in or effect upon the management process, it has converted all effective participants in that process into managers. This leads to the anomaly that most full-time faculty members at Yeshiva—and other universities which solicit and respond to the views of their faculties—are "managers" or "supervisors," and the only remaining faculty members with rights under the Act are part-time teachers with limited involvement in university affairs.

that decision will not only deprive the approximately 209 full-time faculty members at Yeshiva of the protections of the Act, but also will create uncertainty as to whether faculty bargaining units at other educational institutions are entitled to that protection, thereby jeopardizing the stability of numerous established bargaining relationships. Review by this Court is therefore warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1978

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 852—September Term, 1977

(Argued April 26, 1978 Decided July 31, 1978)

Docket No. 77-4182

NATIONAL LABOR RELATIONS BOARD, PETITIONER

—against—

YESHIVA UNIVERSITY, RESPONDENT

—and—

YESHIVA UNIVERSITY FACULTY ASSOCIATION,
INTERVENOR

Before:

LUMBARD, MULLIGAN and TIMBERS,
Circuit Judges.

MULLIGAN, *Circuit Judge*:

The National Labor Relations Board (the Board) has applied for enforcement of its order of August 24, 1977, reported at 231 NLRB No. 98, requiring respondent Yeshiva University (Yeshiva) to recog-

nize the Yeshiva University Faculty Association (the Union) as the exclusive bargaining agent of a unit of Yeshiva's full-time faculty members. The petition for enforcement of the Board's order is denied.

I

On October 30, 1974 the Union filed a petition under § 9(e) of the National Labor Relations Act (the Act), as amended, 29 U.S.C. § 159, for certification of a bargaining unit consisting of full-time faculty at Yeshiva University.[1] In opposition Yeshiva contended that all its faculty members are managerial or supervisory personnel and hence not em-

[1] The Union did not seek to include within the proposed unit the faculty of several schools and affiliates of the University: the Albert Einstein College of Medicine, the Sue Golding Graduate School of Medical Sciences, Yeshiva High School, the Benjamin Cardozo School of Law, and several theological and community programs. The University did not contest the exclusion from the unit of these faculty members. Accordingly, the above divisions of Yeshiva are not here involved and all references to Yeshiva University exclude these schools and programs.

Other faculty excluded from the unit sought by the Union and approved by the Board were part-time faculty; lecturers; Deans, acting deans and Directors; faculty whose initial and subsequent appointment is subject to special funding derived in the main from non-University funds or whose initial or subsequent appointment is in connection with special projects; the Registrar; visiting professors (with effective faculty appointments at other academic institutions); librarians; research assistants; research associates; emeritus faculty not actively engaged in teaching at the University; officers of the University; all other administrative and support personnel; guards, and supervisors as defined in the Act.

ployees within the meaning of the Act. Alternatively, the University sought a unit consisting of all full-time and regular part-time faculty with certain exclusions for managerial or supervisory personnel. Between November 26, 1974 and May 6, 1975 hearings were conducted before a Board-appointed hearing officer. On December 5, 1975 the Board issued its decision and direction of election, reported at 221 N.L.R.B. 1053.

The Board found that the Union was a labor organization within the meaning of the Act and that University faculty were professional employees and not managerial or supervisory personnel. The Board further found that department chairmen, assistant deans, and faculty members of certain committees with University-wide jurisdiction were neither managerial nor supervisory personnel. The Board concluded that a unit of full-time faculty was an appropriate bargaining unit.[2]

[2] The unit approved by the Board included full-time faculty with the titles of professor, associate professor, assistant professor, instructor, or any adjunct or visiting faculty member with such rank, department chairmen, division chairmen, senior faculty and assistant deans. The Board also found that "terminal" faculty members, i.e., those who at the date of the election had received notice of termination or non-renewal of appointment, had reached the mandatory retirement age or had given notice of intention to resign, were eligible to vote if still employed at the date of the election.

Thus the unit sought by the Union was found appropriate with one minor exception: faculty members administering grants under awards by Government or private agencies were excluded from the unit as supervisors under the Act.

In the election held pursuant to the Board's direction between December 16 and 20, 1976 the Union won by a substantial margain. On December 29, 1976 the Union was certified as the exclusive bargaining representative of the employees in the unit.

Yeshiva, however, refused to bargain with the Union and on February 2, 1977, the Board issued a complaint against the University under charges filed by the Union. Yeshiva opposed the complaint and a subsequent motion for summary judgment, again raising objections to the propriety of the NLRB's unit determination.

The University's position was rejected by the Board, which found Yeshiva to be acting in violation of §§ 8(a)(5) and (a)(1) of the Act, as amended, 29 U.S.C. §§ 158(a)(5), (a)(1). The Board granted summary judgment against Yeshiva and ordered the respondent to bargain collectively with the Union. This proceeding was commenced by the Board on October 17, 1977 following Yeshiva's continued refusal to comply with its decision and order.

On this appeal, Yeshiva argues principally, as it did before the Board, that the full-time faculty of the University are managerial and/or supervisory employees within the meaning of the Act and are therefore excluded from the Act's coverage. Yeshiva also urges that two assistant deans and faculty who are departmental or divisional chairmen, or who are members of certain committees on University affairs, exercise additional authority which mandates their

classification as supervisors and/or managers.[3] Before examining these contentions it is necessary to review the structure of Yeshiva and the role played by the faculty in the operation and governance of the University.

II

Yeshiva University is a private institution of higher education chartered under the laws of the State of New York. Its offices and educational facilities are located on four widely separated campuses in New York City. We are here concerned with Yeshiva's six undergraduate colleges and programs,[4] and four graduate schools.[5] Approximately 2,500 full and part-time students are enrolled at Yeshiva. The University is staffed by 209 full-time and 150 part-time faculty members.[6]

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[3] Yeshiva also argues that the Board abused its discretion by excluding part-time faculty from the unit, and permitting terminal faculty members to vote in the election.

[4] The undergraduate units of Yeshiva are Yeshiva College, Stern Collerge for Women, The Teacher's Institute for Women, The Erna Michael College of Hebraic Studies (Erna Michael College), James Striar School of General Jewish Studies (James Striar School) and the Yeshiva Program.

[5] The graduate schools are: Bernard Revel Graduate School, and its summer division, Harry Fischel School of Higher Jewish Studies (Bernard Revel School), Wurzweiler School of Social Work (Wurzweiler School), Ferkauf Graduate School of Humanities and Social Sciences (Ferkauf Graduate School) and Belfer Graduate School of Sciences (Belfer Graduate School).

[6] Below is a numerical breakdown of the faculty members at Yeshiva's ten schools and programs:

[Footnote continued on page 6a]

Yeshiva has a self-perpetuating Board of Trustees with no administrative position at the school apart from their membership on the Board. The University's chief executive officer is the President. There are, in addition, three vice-presidents at Yeshiva (for student affairs, business affairs, academic affairs) as well as a Bursar, Registrar, Director of Admissions and several University deans. An Executive Council of deans and administrators makes recommendations to the President with respect to various matters. Two other committees, the Coun-

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[6] [Continued]

UNDERGRADUATE SCHOOLS

	Full-Time Faculty	Part-Time Faculty
Yeshiva College	47	42
Stern College	38	33
Teacher's Institute for Women	4	7
Jewish Studies Programs		
James Striar School	6	8
Erna Michael College	13	8
Yeshiva Program	10	2
Undergraduate School Subtotals:	118	100

GRADUATE SCHOOLS

Belfer Graduate School	38	3
Ferkauf Graduate School	32	23
Wurzweiler Graduate School	18	14
Bernard Revel Graduate School	3	10
Graduate School Subtotals:	91	50
TOTALS:	209	150

cil of Graduate Schools and the Council of Undergraduate Schools advise the President and Board regarding inter-divisional programs designed to increase coordination and cooperation among the schools and divisions of the University. These councils consist of elected student and faculty representatives from each school or division, the dean or director of each academic unit and members of the University administration, including the President. A Faculty Handbook sets forth University policies regarding faculty appointments, promotion, tenure, termination and sabbaticals.

Each of the schools or divisions is headed by a dean or director. Most of the schools have a faculty assembly or student-faculty senate as well as a committee structure, including, *inter alia*, a curriculum committee, a standards committee, and a welfare committee. The faculty of each school meet periodically and at Stern College, Yeshiva College, and the Belfer and Ferkauf Graduate Schools the faculties meet and conduct their affairs according to written by-laws and/or constitutions which have been approved by the President. Only two of the schools, Yeshiva College and the Belfer Graduate School, have assistant deans. These two assistant deans are teaching faculty members.

Each school, college and program at Yeshiva enjoys great autonomy in determining its own curriculum, grading system, and academic standards as well as in a wide variety of other matters. Therefore the role of the faculty at Yeshiva can best be ap-

preciated by a review of the individual academic units of the University.

1. *Stern College for Women*

At Stern College a Committee on Academic Standards, composed of the Dean of the College, Dean Mirsky, who retains his faculty rank, and six full-time faculty, fixes the academic requirements and decides whether a student whose performance is inadequate will be required to leave the school. Although Dean Mirsky recognizes that the decision to dismiss a student results in a loss of tuition income, he has never overruled the Committee. Similar committees composed predominantly of faculty members establish admission standards, determine graduation requirements, and set up grading systems. Upon the recommendation of a scheduling committee the faculty introduced a new scheduling model for the school. In response to growing budgetary limitations, a faculty committee on personnel and budget has made generally effective recommendations concerning elimination of elective courses, the establishment of joint courses, and other scheduling changes. In the 1969-70 academic year the Stern College faculty disagreed with a decision by Dean Mirsky and the Curriculum Committee to delete Stern's education major; Mirsky reinstituted the major. Indeed, a faculty dominated curriculum committee must pass on all program changes or changes in graduation requirements.

Department chairmen call to Mirsky's attention the need for new faculty members. Interviewing is done

by the chairman and the Dean who then agree on an appointment. Dean Mirsky has never made a faculty appointment which was not approved by a department chairman. Similarly effective recommendations are made by department chairmen regarding termination of faculty members. Mirsky has only once disagreed with a department chairman with respect to a termination.

Promotion recommendations are solicited from department chairmen by a faculty Promotions Committee. The committee passes on its recommendation to Mirsky who has always accepted the committee's decisions. The University President has granted the great majority of recommended promotions and has never overruled a negative recommendation.

Tenure recommendations are made both by Mirsky and the candidate's department chairman to the University President. All negative tenure recommendations by chairmen have been accepted both by Mirsky and by the administration. In only one instance has Mirsky disagreed with a chairman's positive tenure recommendation. Nevertheless, tenure was granted on that occasion.

2. *Yeshiva College*

At Yeshiva College a College Senate composed of faculty, administrators, students and alumni members has jurisdiction over admissions policy, scholastic standards, the grading system and other academic policy matters. All measures passed by the Senate are subject to veto by the Faculty Assembly. The

Dean of the College, Dean Bacon, who is also a professor of linguistics, testified that he feels compelled to see that decisions of the Senate and Assembly are executed. Moreover, not once in Bacon's sixteen years as Dean has the University President veoted an action by either body. Bacon is aided by an assistant dean who teaches one course per semester.

Yeshiva College is divided into "subject areas" which are the equivalent of departments in other schools. The counterpart of the department chairman at Yeshiva College is the senior professor in the subject area. Subject areas are grouped into four broad divisions. One senior professor in each division serves as a "divisional chairman."

The divisional chairmen comprise the Advisory Council on Promotions. Recommendations on promotions by the Council have always been followed by the President of the University, although such recommendations have, at times, been in conflict with those made by Dean Bacon.

Senior professors screen applicants for faculty positions. Dean Bacon and the senior professor then jointly make the hiring decisions with Bacon generally accepting the recommendations of the senior professor. Indeed, the Dean has never appointed a faculty member over the objection of a senior professor and once sustained a senior professor's objection over the appointment desired by a University Vice-President for Academic Affairs. Dean Bacon has given equal deference to the recommendations of senior professors regarding termination and re-

appointment of probationary faculty. Finally, senior professors largely determine the budget of their subject area. The budget requests of the senior professors receive perfunctory approval by Bacon "99 percent" of the time and, during Bacon's tenure had never been rejected by the University administration.

3. *Erna Michael College*

At Erna Michael College, admissions procedure, curricular matters, grading, scheduling and other questions of academic policy are subjects on which the faculty, through the faculty meeting, governs. The faculty has also implemented a basic restructuring of the College in which the number of academic hours required of students was substantially reduced. As a result, faculty at the College now teach fewer hours and teach a minimum of only three rather than four days per week. Dean Rabinowitz of Erna Michael testified that he felt bound to institute even those faculty decisions with which he disagreed, such as the establishment of trimester academic calendar. Neither Dean Rabinowitz nor any other member of the administration has ever vetoed a decision of the faculty on such issues.

Evaluation of faculty to determine whether retention or salary increase is warranted is often carried out at a meeting of faculty in the affected member's academic subject area and is led by the senior professor who, as at Yeshiva College, is the equivalent of a department chairman. At other times such evaluations are simply made by the senior professor.

The role of the senior professors at Erna Michael regarding promotion and termination of faculty is very similar to that at Yeshiva College.

4. *The Teacher's Institute for Women*

The Director of the Teacher's Institute, Rabbi Faivelson, testified that the faculty had made effective recommendations regarding curriculum, admissions policy and degree requirements.

When the need for a new faculty member arises Rabbi Faivelson asks the faculty[7] whether they have any objections to the applicants. Faivelson stated that if any faculty member has the slightest objection the applicant is not hired. On an occasion where Faivelson favored termination of a faculty member for budgetary reasons the faculty voted against the termination and the faculty member was retained.

Rabbi Faivelson once recommended that the Institute move to Brooklyn to attract better students. The faculty rejected the proposal and determined that the school would remain in Manhattan.

5. *James Striar School*

Director of James Striar, Rabbi Besdin, who carries a full-time teaching load, testified that faculty meetings are "in a great sense decisive as to the direction of the school." The faculty at James Striar have considered at their meetings administrative

[7] There are no faculty ranks at the Institute. Thus, there are no department chairmen or senior professors.

regulations, curriculum matters, and course offerings. Rabbi Besdin testified that he did not recall ever overruling a direct recommendation of the faculty. Indeed, he stated that on one occasion a majority of the faculty rejected his recommendation to retain a student guidance procedure, thereby "overruling" Besdin on the issue.

Part-time faculty hiring decisions are made by Besdin and the affected department chairman. Besdin has never hired a full-time faculty member without consulting the concerned department head.

6. *The Yeshiva Program*

Rabbi Charlop is the Director of the Yeshiva Program, which provides a course of study in Talmudic texts. There are no traditional faculty ranks at the Yeshiva Program. Rabbi Charlop testified that decisions affecting academic matters are made by a consensus of the faculty. In one instance the faculty decided to extend the academic calendar by two weeks and this decision was implemented.

7. *Belfer Graduate School*

Arthur Komar became Belfer's Dean in 1968 after the school's faculty successfully petitioned the President of the University for the removal of Komar's predecessor. Thereafter, Komar was elected Acting Dean by the faculty and he obtained a vote of approval from the faculty before accepting a permanent appointment as Dean. Komar, who was teaching one course at Belfer when he testified, stated that he

viewed his position as Dean as "first among equals." Komar's assistant dean is a tenured assistant professor who teaches one course each semester.

At Belfer a Faculty Council deals with curricular problems, size of departments and formation of new departments. It has even discussed the financial and wage policies of the school. The majority of the key decisions in the governance of Belfer, however, are made by the school's departments. The hiring of faculty members and the length of their appointments are determined by a majority vote of the department. Dean Komar testified that his only role in hiring is his participation—like any other faculty member—in the discusison and voting on applicants to his department. Decisions on promotion, tenure and nonrenewal of faculty appointments are also made within each department by consensus. Komar stated that he does not believe he has the right to override such departmental decisions. Salary negotiations with new faculty are arrived at not by Komar but by department chairmen. The chairman's recommendations for salary figures are generally accepted by the Dean.

8. *Ferkauf Graduate School*

As at Belfer, faculty hiring decisions at Ferkauf are effectively made by consensus of the department. The Dean of Ferkauf, Dean Gittler, last taught a course in the semester prior to his testimony. He stated that he accepts "98 percent" of faculty appointments recommended by the departments and the administration has never vetoed an appointment.

Rank of appointees (and thus their salary) is also decided by the department.

Many other aspects of the school's operation are resolved by faculty committees. The Promotions Committee effectively determines questions of faculty promotions. In fact, a promotion has never been made in the face of a negative committee decision and only once in the past nine years has a positive committee recommendation not resulted in the faculty member's promotion.

Tenure questions are handled by the Faculty Council on Tenure. Neither Dean Gittler nor the administration has ever reversed a negative tenure decision of the Council. Only once has a positive recommendation not resulted in a grant of tenure.

Department chairmen at Ferkauf wield substantial budgetary power through the Chairmen's Council. Until the budget cutbacks of the last few years every aspect of the budget was deliberated by the Council. Similarly, tuition increasse are never recommended by Dean Gittler unless the chairmen concur. Chairmen also establish, in consultation with their departments, the workload of the full-time faculty.

9. *Wurzweiler School*

The role of the faculty at Wurzweiler is very similar to that at Ferkauf. The acting Dean of Wurzweiler, Dr. Green, who retains his faculty rank and was teaching two courses at the time of the hearings, testified that the internal operation of the school is "heavily governed" by faculty decisions. In addi-

tion to wielding great power on academic matters, the faculty has made decisions with serious budgetary consequences. For example, when Dean Green proposed a $500 tuition increase the faculty disagreed and sought an increase of only $300. The faculty's position prevailed. The faculty also made a decision to increase the size of the student body at Wurzweiler.

Faculty committees play a prominent part in the running of Wurzweiler. One such committee monitors the school's community social work program to ensure compliance with the goals of the outside agency which funds the program. Thus the committee's oversight has an important effect on retention of the program's funds.

The hiring, promotions, termination and tenure policies of the school were in a transitional state at the time of the hearings. Hiring was currently conducted by an ad hoc faculty committee which made a selection from candidates submitted by the Dean, who accepted all committee recommendations. A personnel committee has drawn up guidelines for substantial expansion of the faculty's role in questions of promotion, termination and tenure. While these guidelines have not been fully enacted to date, Dean Green confirmed that except for a minor clause which was contrary to provisions of the University's Faculty Handbook, the Wurzweiler faculty had authority to promulgate such guidelines, which were then binding on the dean.

10. *Bernard Revel School*

At the time of the hearings Revel had no permanent Dean. Dr. Leo Landman, Secretary of the Faculty, was currently overseeing the day-to-day operation of the school as well as teaching two courses. Landman testified that decisions on curriculum, admissions requirements, degree requirements, and course offerings were made by consensus of the faculty. Landman further stated that the faculty's decisions were generally given effect.

According to Landman's uncontroverted testimony, department chairmen at Revel made effective recommendations regarding both full and part-time faculty hiring. In fact, chairmen's negative recommendations in this area had always been upheld.

* * * * *

Two other important organs of University-wide faculty governance should be mentioned. The Faculty Review Committee is composed of eight tenured faculty members who are elected from the various schools of the University. The Committee has jurisdiction to review faculty grievances, particularly those concerning promotion and tenure. If the grievance is not satisfactorily resolved after the Committee has notified the Dean of the interested school, the Committee is authorized to recommend action to the President. Faculty members, along with students and administrators, also sit on a recently formed Committee on Academic Priorities and Resource Allocation. The purpose of this Committee is to provide a long-range

scale of academic and fiscal priorities at Yeshiva. Hence, Dean Rabinowitz, a committee member, testified that the Committee is empowered to reevaluate the objectives of the schools of the University, and to review class size, staffing patterns, physical facilities, tuition levels and fund raising methods. It should be noted, however, that this committee at the time of the hearings had met only twice and had not focused upon particular problems nor made any specific recommendations.

III

The major issue raised in this case is whether the full-time faculty [8] of Yeshiva are supervisors within

[8] While we need not resolve the question, we note that we agree with the Board that the part-time faculty is properly excluded from the unit because they play a significantly lesser role in the affairs of the University than the full-time faculty and there is a lack of mutuality of interests between the two groups. *Trustees of Boston University* v. *NLRB*, Dkt. 77-1143, slip op. at 14 (1st Cir. April 13, 1978); *Kendall College* v. *NLRB*, 570 F.2d 216 (7th Cir. 1978); *New York University*, 205 N.L.R.B. 4, 6-7 (1973). In view of our disposition we need not pass on Yeshiva's position that terminal faculty should have been excluded from the unit and two assistant deans included. Also academic is the University's argument that certain committee and department chairmen who exercise supervisory power over non-unit personnel must, on that account, be excluded as supervisors.

One apparent rationale for the Board's inclusion of these chairmen in the unit is its so-called 50 percent rule, established by the Board in *Adelphi University*, 195 N.L.R.B. 639 (1972), under which the Board does not denominate as supervisors those faculty members who supervise nonprofessionals less than 50 percent of the time. Recently, the First Circuit cited this doctrine to support inclusion of faculty chairmen

section 2(11) of the Act, 29 U.S.C. § 152(11), and/or managerial personnel within the Board's own definition as adopted by the courts, and therefore whether these faculty members are improperly included as employees in the bargaining unit.[9]

Section 2(11) defines a supervisor as follows:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to

in a bargaining unit in a case where the court found such supervisory duties occupied only 5 to 10 percent of the individuals' time. *Trustees of Boston University* v. *NLRB*, *supra*, slip op. at 10 n.4. The court withheld its view of the validity of this rule in situations involving significantly greater amounts of time spent in a supervisory role. This court has specifically declined to assess the "legal justification" for the 50 percent rule. *NLRB* v. *Mercy College*, 536 F.2d 544, 550 (2d Cir. 1976).

[9] Although the Board has, on a number of occasions, considered the question whether full-time faculty at a mature university are supervisors or managers under the Act, see cases cited in text at 4139, *infra*, no court of appeals has squarely determined the issue. In *NLRB* v. *Wentworth Institute*, 515 F.2d 550 (1st Cir. 1975) the First Circuit simply rejected the Institute's argument that *all* faculty at *all* institutions of higher learning must be excluded from the Act's coverage. Limiting itself to the institution at hand, the court found that at Wentworth there was "no evidence of an instance of significant faculty impact collectively or individually on policy or managerial matters." Id. at 557. In *Trustees of Boston University* v. *NLRB*, *supra*, the university argued that certain department chairmen were supervisors rather than that the entire faculty should have been deemed managerial or supervisory.

> adjust their grievances, or to effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well settled in the industrial context that possession of any one of the enumerated powers in section 2(11) or the power to effectively recommend with respect to any one of them is sufficient to satisfy the statutory definition of a supervisor.[10] E.g., *NLRB* v. *Metropolitan Life Insurance Co.*, 405 F.2d 1169, 1177 (2d Cir. 1968); *NLRB* v. *Quincy Steel Casting Co., Inc.*, 200 F.2d 293 (1st Cir. 1952); *Ohio Power Co.* v. *NLRB*, 176 F.2d 385 (6th Cir.), cert. denied, 338 U.S. 899 (1949).

[10] It should be noted, however, that the Board has been less rigorous in denominating individuals as supervisors in those cases in which the employees involved were professionals within the meaning of section 2(12) of the Act, 29 U.S.C. § 152(12). E.g., *General Dynamics Corp.*, 213 N.L.R.B. 851 (1974); *Adelphi University, supra,* at 644. In instances in which the professionals involved possessed only limited supervisory authority and exercised such authority only sporadically the courts have been willing to accept the Board's position. E.g., *Trustees of Boston University* v. *NLRB, supra,* at 10; *Westinghouse Electric Corp.*, 163 N.L.R.B. 723 (1967), enf'd, 424 F.2d 1151 (7th Cir.), cert. denied, 400 U.S. 831 (1970). This discrepancy in the Board's approach seemingly results from the tension between the exclusion from the Act of supervisors under section 2(11) and the inclusion of professional employees under section 2(12). M. Finkin, The Supervisory Status of Professional Employees, 45 Fordham L.Rev. 805, 807-828 (1977). However, we cannot accept this rationale in the instant case, where the supervisory and managerial authority of the faculty is so pervasive and consistently exercised.

Managerial employees are exempted from the coverage of the Act not by explicit statutory language but as a matter of Board policy and unanimous court approval. *NLRB* v. *Bell Aerospace Co., Division of Textron, Inc.*, 416 U.S. 267, 285-89 (1974). Employees who fall within this category include " 'those who formulate, determine, and effectuate an employer's policies.' " *Retail Clerks International Association* v. *NLRB*, 366 F.2d 642, 645 (1966) (Burger, *J.*), cert. denied, 386 U.S. 1017 (1967). In *NLRB* v. *Bell Aerospace Co., Division of Textron, Inc., supra,* the Supreme Court emphasized the mandatory nature of the exclusion of all employees found to be managerial.

> [T]he Board's early decisions, the purpose and legislative history of the Taft-Hartley Act of 1947, the Board's subsequent and consistent construction of the Act for more than two decades, and the decisions of the courts of appeals all point unmistakably to the conclusion that "managerial employees" are not covered by the Act.

Id. at 289. The Court concluded that the Board " 'is not now free' to read a new and more restrictive meaning into the Act" by which certain managerial employees would be held to be within its coverage. Id.

The record, which has been set forth in some detail in Part II and which is not controverted by the Board, strongly supports the contention of Yeshiva that a full-time faculty, acting at times through committees or department chairmen,[11] and at other times

[11] We do not dispute the Board's finding that when department chairmen at Yeshiva act on matters such as faculty ap-

as a body, exercises supervisory and managerial functions as defined by section 2(11) of the Act and within the Board's prior holdings as discussed in *NLRB* v. *Bell Aerospace Co., Division of Textron, Inc.* We stress that our function is not to examine *in vacuo* the governance procedures of all four-year private institutions of learning described in the briefs of the *amici* universities as "mature" institutions of higher education. Many such institutions have apparently adopted a collegial decision making process in which the faculty plays a decisive role in the development of institutional policy. Given the great diversity in governance structure and allocation of power at such universities it is appropriate to address ourselves solely to the situation at the institution involved in this proceeding. *NLRB* v. *Wentworth Institute*, 515 F.2d 550, 556 (1st Cir. 1975). The record here discloses that in many instances the full-time faculty of the schools of Yeshiva without question effectively recommend the hiring, promotion, salary and tenure of the faculty of the University in a manner which can hardly be described as routine or clerical. They further perform managerial functions not only by their personnel decisions but by adopting the standards of admission, the curriculum, the grading system and the graduation requirements of their school. Moreover, in particular cases the hiring of deans, the physical location of a school, teaching loads, and even the tuition to be charged were controlled by the full-time faculty. Indeed, the ability of the full-time faculty effectively to recommend or even to exercise many of the enumerated powers of section 2(11) and to formulate and effectuate University policy is not really disputed here. The Board's decision of December 5, 1975 treated the issue summarily.

> We find from our examination of the record, however, that the role and authority of the faculty herein with respect to hiring, promotion, salary increases, the granting of tenure, and other areas of governance are not significantly different from what they were in [previous Board decisions] wherein the same arguments were rejected. At Yeshiva University, faculty participation in collegial decision making is on a collective rather than individual basis, it is exercised in the faculty's own interest rather than "in the interest of the employer," and final authority rests with the board of trustees. (Citations omitted).

221 N.L.R.B. 1053, 1054 (1975). The Board concluded that "the faculty members are professional employees under the Act who are entitled to vote for or against collective-bargaining representation" and that a unit of full-time teaching faculty members was appropriate.

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pointments, tenure, salary increases and the like, they function "primarily as instruments of the faculty." See, e.g., *Trustees of Boston University* v. *NLRB, supra,* slip op. at 9; *New York University, supra; Fordham University,* 193 N.L.R.B. 134 (1971). Rather, this finding of the Board reinforces our belief that in a variety of ways the full-time faculty at Yeshiva wields supervisory and managerial power.

Thus, without any analysis the Board found that Yeshiva's full-time faculty were neither supervisors nor managerial personnel simply by stating that the substantial authority of the faculty was wielded in their capacity as professionals and by invoking three doctrines promulgated in earlier Board rulings. Since we are unpersuaded that these four justifications for the Board's decision on this point withstand careful scrutiny, we will analyze them, *seriatim*, below.

A. *The Full-Time Faculty are Professional Employees.*

Under section 2(12) of the Act, 29 U.S.C. § 152 (12),[12] a professional employee is specifically in-

[12] Section 2(12) of the Act defines a professional employee as

> (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or
>
> (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

cluded within the Act's coverage despite the fact that in the performance of his work he must exercise consistent discretion and judgment. Yeshiva does not argue that its full-time faculty members are not professional within the statutory definition of that term. They are obviously engaged in work which is "predominately intellectual," requiring advanced knowledge in a field of learning, and they do not perform work which is "routine mental, manual, mechanical, or physical" in nature. However, the fact that employees are professional does not preclude them from also being categorized as supervisory or managerial employees ineligible for inclusion in a bargaining unit. See, e.g., *General Dynamics Corp.*, 213 N.L.R.B. 851, 860, 862, 863 (1974); *Westinghouse Electric Corp., supra*, at 726; *American Oil Co.*, 155 N.L.R.B. 46, 48, 49 (1965); *Puget Sound Power & Light Co.*, 117 N.L.R.B. 1825, 1827 (1957). Even in an educational setting, the Board in *University of Chicago Library*, 205 N.L.R.B. 220 (1973), en'd, 506 F.2d 1402 (7th Cir. 1974) and *Claremont Colleges*, 198 N.L.R.B. 811 (1972) excluded professional librarians from a unit of library employees because they supervised non-professionals. Hence, it has been established by the Board's own decisions that simply because individuals are professionals under section 2(12), that status *per se* does not preclude their classification as supervisory or managerial personnel.

Whether, as a matter of policy, faculty members of institutions of higher learning are advantaged or

disadvantaged by collective bargaining is an issue which has understandably created divergent views.[13] But the Board, like the court, is bound both by the Act and by prior judicial interpretations of it. Unquestionably, a university full-time faculty member has the authority to determine the content of his course, the method he employs in teaching it, and the evaluation of his students' academic performance. *New York University, supra,* at 5. These factors place such faculty members squarely within the language of section 2(12) and these attributes of professionalism should not characterize them as managerial or supervisory.

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[13] *Compare,* e.g., Kahn, The NLRB and Higher Education: The Failure of Policymaking Through Adjudication, 21 U.C.L.A. L.Rev. 63, 79-83 (1973) (hereinafter cited as Kahn); Kadish, The Theory of the Profession and Its Predicament, 58 A.A.U.P. Bull. 120, 122 (1972); and Brown, Collective Bargaining in Higher Education, 67 Mich. L.Rev. 1067, 1072 (1969), *with* The Carnegie Commission on Higher Education, Governance of Higher Education, A Report and Recommendation (1973); and Bloustein, A Chamber of Horrors!, in The Effects of Faculty Collective Bargaining on Higher Education 110 (R. Hewitt ed. 1973).

The Board acknowledges in its brief that the activities of the full-time faculty at Yeshiva might suggest managerial or supervisory status in other contexts, but not in the case of an institution of higher learning. The legal justification for a different standard for university faculty is not made clear. The Board does comment, however, that labor organizations currently administer collective bargaining agreements for faculty at over 500 colleges and universities across the country and, therefore, the Board's position comports with "widely shared recognition of the organizational rights of faculty."

However, the issue as we perceive it in this case involves not simply the professor's exercise of discretion in conducting the courses he is employed to teach. Rather, the issue here is the extensive control of Yeshiva's faculty over what courses are taught in the institution, who teaches them, the number of teaching hours required of the faculty, and the rank, salary, and tenure status of other faculty members. We are further concerned by the crucial role of the full-time faculty in determining other central policies of the institution including, *inter alia,* the curriculum, admissions and graduation requirements, tuition, and in one instance, even the situs of a school. When faculty members have such power—as the board indicates they do at Yeshiva—they no longer are simply exercising individual professional expertise. They are, in effect, substantially and pervasively operating the enterprise.

The Board relies in part on *General Dynamics Corp., supra,* at 857-58, where it commented that a lawyer or a certified public accountant might well as a professional "cause a change in company direction or policy which is based upon his professional advice alone," and yet should not on that account be held a managerial employee. However, we cannot reasonably equate the input of professionals in a profit-making commercial enterprise, whose advice based on their "technical expertise," id., may influence management on occasion to implement policy changes,

with that of the full-time university faculty, which is here largely responsible for the conduct and direction of an institution of higher education. This is not the case of a company which hires an occasional scholar to guide it in making engineering, legal or accounting decisions which have an impact on its business; this is the "company of scholars" itself. It is well recognized that most university faculties enjoy a state of independence and influence on policy which is "entirely unknown among the professionals in private industry." Kahn, *supra*, at 68; accord, Sands, The Role of Collective Bargaining in Higher Education, 1971 Wis. L. Rev. 150, 157. As Mr. Justice Cardozo noted: "By practice and tradition the members of the faculty are masters not servants. . . . They have the independence appropriate to the company of scholars." *Hamburger* v. *Cornell University*, 240 N.Y. 328, 336-37, 148 N.E. 539, 541 (1925).

Thus, while we readily concede that Yeshiva's full-time faculty satisfy the Act's criteria for professional status, we reject the Board's position that by the possession and exercise of the broad powers detailed in Part II of this opinion the full-time faculty at Yeshiva act only as professionals and not in a managerial or supervisory capacity.

B. *The Full-Time Faculty Acts Collectively.*

The Board here adheres to the view it first expressed in *C.W. Post Center of Long Island University*, 189 N.L.R.B. 904 (1971) and has reiterated

in *Northeastern University*, 218 N.L.R.B. 247 (1975); *University of Miami*, 213 N.L.R.B. 634 (1974); *Adelphi University, supra;* and *Fordham University, supra.* The Board's position is that since the faculty's supervisory and managerial functions are exercised "on a collective basis" rather than by individual faculty members, they must be denied status as supervisory or managerial personnel. The Board's rationale is not adequately explained in this or in its prior opinions.[14] Section 2(11) does, however, state that it is applicable to "an individual" who possesses the enumerated indicia of supervision. Since the control here in issue is not that of individual faculty member over nonprofessionals, but the collective control exercised by the faculty either in con-

[14] When the Board first announced this view in *C.W. Post Center of Long Island University, supra*, at 905, it did so without benefit of analysis, and without citation to pertinent administrative decisions, judicial precedents or legislative history. In *Fordham University, supra*, the Board repeated its conclusory approach to the problem. Finally, in *Adelphi University, supra*, the Board conceded that its position arose not from precedent but from its puzzlement in attempting to apply to the unique university governance structure terms which were "designed to cope in the typical organizations of the commercial world." Id. at 648. The Board admitted that it could not square the Act with the university setting in which "power and authority is vested in a body composed of all of one's peers or colleagues." Id. See Kahn, *supra*, at 95, 120-25. In two subsequent decisions, *Northeastern University, supra*, and *Miami University, supra*, the Board refused to further analyze or reconsider the issue of the supervisory or managerial status of full-time faculty. Instead, it dismissed the question, as it did in this case, solely by reference to its earlier rulings.

cert, through department chairmen, or through faculty dominated committees, it must be conceded that if read literally the statutory definition can be construed not to cover the full-time faculty. Since students are not employees the individual faculty supervision over students does not fit within the statutory definition, which requires that the supervisory power be directed to employees. There is the further logical difficulty of holding that the supervisory employees supervise other supervisory employees, cf. *General Dynamics Corp., supra,* at 859; *Post-Newsweek Stations, Capital Area, Inc.,* 203 N.L.R.B. 522 (1973), although this is somewhat defused when we consider that in many of Yeshiva's schools the full-time faculty also supervise collectively the activities of the part-time faculty.

Certainly, however, this Board interpretation is not the only reasonable reading of the language of section 2(11). In view of the statute's ambiguity we are disturbed by other holdings of the Board in which the collective exercise of supervisory authority was *not* grounds for exclusion from that status. Thus in *Florida Southern College,* 196 N.L.R.B. 888, 889 (1972), a case decided after the Board's rulings in *C.W. Post, supra, Fordham University, supra,* and *Adelphi University, supra,* the Board excluded a teaching dean from the faculty bargaining unit because he sat on a *committee* which made effective recommendations regarding the hiring and firing of faculty members. See also *Western Saw Manufac-*

turers, Inc., 155 N.L.R.B. 1323, 1329 n.11 (1965) (foreman held a supervisor in part due to service on a board which determined employee termination). The inconsistent interpretation of this provision by the Board is also troublesome in that the Board refers this court to no legislative history of the section —and our own review has uncovered none—which clearly supports the "collective authority" doctrine which the Board urges upon us. Rather, the history of section 2(11) indicates that such collective supervision simply was not actively considered by Congress at the time. See S.Rep. No. 105, 80th Cong., 1st Sess. 3-5 (1947); H.R. Rep. No. 245, 80th Cong., 1st Sess. 13-18 (1947); H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 35-36 (1947). Indeed, one commentator has stated that there is no citable precedent for the "collective authority" approach first taken by the Board in *C.W. Post, supra.* Kahn, *supra,* at 95. Moreover, we think a construction of section 2(11) as including individuals who exercise supervisory functions as part of a group or committee is a realistic interpretation of the section since group action is so frequently encountered in modern corporate decision making. See, e.g., N. Jacoby, Corporate Power and Social Responsibility 58 (1973); H. Oleck, Non-Profit Corporations and Associations § 183 (1956).

We need not resolve this point, however, since there is no such "individual" statutory restriction in the Board's own concept of "managerial employees." In

fact, in *NLRB* v. *Bell Aerospace Co., Division of Textron, Inc., supra,* the managerial personnel found not to be within the collective bargaining unit exercised their managerial functions as a "team." Id. at 270.[15] Logically, we see no reason that the fact that the policies of a company are created by a group (as indeed they usually are by the Board of Directors) rather than by an individual should be of signficance in determining whether an individual has managerial status, and the Board has advanced no satisfactory rationale for the weight it has given this factor.

C. *The Faculty Acts on Their Own Behalf and Not in the Interest of the Employer.*

As it has done consistently in the past,[16] the Board here denied managerial or supervisory status to the full-time faculty on the additional ground that the faculty is alleged to be acting on its own behalf and

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[15] Cf. *Sida of Hawaii, Inc.*, 191 N.L.R.B. 194, 195 (1971); *Red and White Airway Cab Co.*, 123 N.L.R.B. 83, 85 (1959); *Brookings Plywood Corp.*, 98 N.L.R.B. 794, 798 (1952). In these cases employee-shareholders were excluded from the bargaining units where in the aggregate they held sufficient shares to give them an effective voice in the formulation of corporate policy.

It should also be noted that in *NLRB* v. *Wentworth Institute, supra,* no managerial or supervisory exclusion was found because the court perceived no evidence of "significant faculty impact *collectively or individually.*" Id. at 557 (emphasis added).

[16] *Northeastern University, supra; University of Miami, supra; Adelphi University, supra;* see *New York University, supra.*

not on behalf of Yeshiva, its employer. The record in no way supports this proposition and in its argument the Board simply advances the conclusory statement that collegial action by peers is inherently action in the interest of the faculty themselves, not in the interest of the University *qua* employer. Indeed, this is characterized in the Board's brief as a "circumstance peculiar to most institutions of higher learning." However, looking at the record one cannot escape the conclusion that even assuming that the faculty's determinations on personnel, curriculum, admissions, grading, graduation requirements and other policy issues were motivated by the faculty's own best interests, the fact that the administration and Board of Trustees of Yeshiva so rarely interfered in the faculty decisions indicates that the interests of the faculty and of the University were almost always coextensive. Cf. *NLRB* v. *Scott Paper Co.*, 440 F.2d 625, 630 (1st Cir. 1971) (court rejected Board's argument that tractor owner-operators were not supervisors because authority not exercised in interest of employer company on ground that interests "were so intertwined that powers were exercised for both."); *Deaton Truck Lines, Inc.* v. *NLRB*, 337 F.2d 697 (5th Cir. 1964), cert. denied, 381 U.S. 903 (1965) (same). Certainly, the deans whom the Board found to be supervisory or managerial displayed a remarkable degree of acquiescence and often went so far as to proclaim their identity of interest

with the faculty.[17] The full-time faculty as a whole or through committees have not in fact acted simply in an advisory capacity, nor have they merely made recommendations which were accorded substantial weight; their decisions on major policy issues have, for the most part proved definitive. Our review of the record leads us to conclude that at Yeshiva University, as Director Faivelson remarked of the Teacher's Institute: "The faculty is the school."

Aside from the record, there is nothing in the Board's reasoning which would support the proposition that the full-time faculty is somehow acting on its own behalf and not that of the University. In fact, a realistic assessment of the way in which a university such as Yeshiva functions, demonstrates the inapplicability of the "interest of the faculty" analysis in such a context:

> The faculty, by the very nature of the educational process in institutions of higher education, participates in decision making which in private industry would normally be regarded as a management prerogative. The faculty at most four-year colleges and universities has a voice in determining standards for admissions, curriculum, degree requirements, faculty hiring and promotion, and even tuition rates. Such a state of independence is entirely unknown among the professionals in private industry. Furthermore, in

[17] For example, Dean Rabinowitz of Erna Michael College testified that his role was "simply [to] carry out the mandate of the faculty," and Dean Komar of Belfer Graduate School saw his position as Dean as "first among equals".

> higher education there is no sharp dividing line between the employer and the employees. The university is, ideally, a professional community in which common educational interests supersede all potential divisions between the faculty and the administration. The university's unique set of goals (education, research, and service) is achieved only by a series of specialist communities working together through their common concern for enlarging and applying their own spheres of knowledge. Thus, there is no sharp dividing line between the community of administrators and the community of faculty, for both have the common goal of striving to further the institution as a house of learning.

Kahn, supra, at 68 (citation omitted).

This concept of "shared authority" in the university and private four year college has its origins in the Middle Ages when teachers united "into a corporate body enjoying more or less autonomy" over the operation of the institution. McHugh, Collective Bargaining With Professionals in Higher Education: Problems in Unit Determinations, 1971 Wis. L. Rev. 55, 65 (hereinafter cited as McHugh). In 1966, a Statement on Government of Colleges and Universities, 52 A.A.U.P. Bull. 375 (1966) (hereinafter cited as Statement), which was jointly formulated and approved by the American Association of University Professors, the American Council of Education, and the Association of Governing Boards of Universities and Colleges, applauded the principle of shared authority among the Board of Trustees, the adminis-

tration, and the faculty. The statement recognized that

> [t]hese three components have the joint authority and responsibility for governing the institution, and the essential and overriding idea is that the enterprise is joint and that there must be "adequate communication among these components, and full opportunity for appropriate joint planning and effort."

Kahn, *supra*, at 71.

Whatever the situation may be in other institutions, the record here establishes no significant divergence between the interests of the faculty and those of the administration or the Board of Trustees. On the contrary, the faculty has initiated, and the administration has repeatedly accepted, major policy determinations which constitute the essence of the University's educational venture. We cannot conclude that the full-time faculty here has acted in its own interest. Even if it had, the University has accepted those decisions without hesitation so consistently that the Board's attempt to dichotomize those interests results in a strained, artificial separation. Whether the degree of control exercised by the faculty and the forbearance of the administrators is salutary fiscally and academically is not in issue here. In fact it does exist.

D. *The Faculty is Not Managerial or Supervisory Because it is Subject to the Ultimate Authority of the Board of Trustees.*

Although none of the criteria applied by the Board which we have so far discussed has any particular appeal, the concept that the faculty has neither managerial nor supervisory status because it is subject to the ultimate authority of the Board of Trustees is particularly unconvincing.[18] Normally, every corporation is ultimately operated by its Board of Directors, W. Cary, Corporations 153 (4th ed. 1969), and yet that fact obviously has never precluded a finding that there are managerial or supervisory employees in the corporation. Certainly the President and Vice-Presidents of Yeshiva as well as its Deans are subject to the ultimate authority of the Board of Trustees and yet this does not preclude them from holding managerial or supervisory status.

Section 2(11), in defining a supervisor, expressly includes those who have the power "effectively to recommend" any of the enumerated actions. Obviously then, the section contemplates a review by some higher authority.[19] In another context we have al-

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[18] The Board has also relied on this ground for denial of supervisory and managerial status to faculty in *Northeastern University, supra; University of Miami, supra; New York University, supra; Adelphi University, supra; C.W. Post Center of Long Island University, supra.*

[19] In the industrial context the Board has deemed to be supervisors those whose recommendations of the actions

ready indicated

> This power to review held by the immediate supervisors of the engineers whose status is at issue does not demonstrate that the latter are not "supervisors" under the Section 2(11) definition. The power to recommend promotion is, of course, not the power actually to promote and consequently *promotion recommendations will always be subject to review by those others who, in fact, have the final power to promote.*

NLRB v. *Metropolitan Life Insurance Co.*, *supra*, at 1177 (emphasis supplied).[20]

Private universities are usually created by charter under the corporation law of the state where they are located. Kahn, *supra*, at 124; see, e.g., N.Y.N.F.P. Corp. Law § 701 (McKinney's Supp. 1976). Hence, invariably there will be ultimate authority existing in a Board of Trustees or Directors. H. Oleck, Non-Profit Corporations, Organizations and Associations 300, 622 (1965). If this factor alone is to preclude full-time faculty members from assuming managerial or supervisory status, no matter what their actual involvement in the governance of an educational institution, then it is difficult to contemplate *any situation* where the statutory and Board-created exemp-

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designated in section 2(11), although reviewed by higher authority, were consistently given effect. E.g., *Transformer Engineers*, 114 N.L.R.B. 1325, 1327 (1955).

[20] See also, e.g., *Amalgamated Local 355* v. *NLRB*, 481 F.2d 996, 999-1000 (2d Cir. 1973); *Eastern Greyhound Lines* v. *NLRB*, 337 F.2d 84, 86 (6th Cir. 1964); *NLRB* v. *Southern Airways Co.*, 290 F.2d 519, 524 (5th Cir. 1961).

tions can be applied. Of course, it may well be that at other institutions the Boards of Trustees have in fact regularly reviewed and rejected faculty recommendations, but this is not the case at Yeshiva.

IV

We are urged by the Board that its factual findings as to employee status are entitled to great weight and are not lightly set aside. *Stop & Shop Companies, Inc.* v. *NLRB*, 548 F.2d 17, 18 (1st Cir. 1977); *NLRB* v. *Monroe Tube Co., Inc.*, 545 F.2d 1320, 1325 (2d Cir. 1976); *Amalgamated Local 355* v. *NLRB*, *supra*, at 100; *NLRB* v. *Metropolitan Life Insurance Co.*, *supra*, at 1172. Thus, a Board determination that an individual is an employee under the Act will stand if it has warrant in the record and a reasonable basis in the statute. E.g., *Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298 (1977); *NLRB* v. *Hearst Publications*, 322 U.S. 111, 131 (1944).[21] However, with respect to the status of full-time faculty the Board here has made no factual findings which would preclude supervisory or managerial status, nor has the Board advanced any persuasive rationale for refusing to so categorize Yeshiva's faculty.

The Board concedes, in effect, the substantial impact of the full-time faculty both as supervisors and

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[21] Closer scrutiny of the Board's determinations, however, will result where, as here, the Board has acted inconsistently with prior rulings in reaching its decision. See *Niagara University* v. *NLRB*, 558 F.2d 1116, 1118 (2d Cir. 1977); B. Schwartz, Administrative Law §§ 235-36 (1976).

managers. Its denial of this status, as we have pointed out in Part III of this opinion, is based upon its continuing position, without further exposition, that full-time faculty are merely professional employees under section 2(12) of the Act. But this offers no solution to the problem since prior Board holdings and judicial opinions clearly indicate that the professional may also be supervisory or managerial. The Board has also insisted that since the faculty act collectively, they must be denied supervisory or managerial status. While there may be some arguable warrant for this position on their status as supervisors in the wording of section 2(11), there is no reason in precedent or logic why this factor should be held to preclude managerial status for full-time faculty.

Oddly, the Board also found that department chairmen and faculty who serve on the Committee on Academic Priorities and Resource Allocation and on the University Faculty Review Committee were neither supervisors nor managers because they serve "primarily as instruments of the faculty" in these matters. If we accept the Board's argument that these chairmen and faculty committee members are simply instruments of the faculty, the Board is in the inconsistent position of finding that the full-time faculty at Yeshiva manages or supervises effectively by its collective or collegial action although this is the very process the Board utilizes to disqualify them as supervisors or managers. Another apparent contradiction is the Board's recognition of the ultimate

authority of the Board of Trustees of Yeshiva although this body only acts collectively. Indeed, on the record here the "ultimate authority" of the trustees has little, if any, practical effect since, as at most universities, McHugh, *supra*, at 68; Statement, *supra*, at 376-77, the trustees' authority has been delegated to the faculty and administration.

It is clear that the Congress, when it amended the Act in 1947, had no contemplation that it would be applied to professional faculties in private institutions of higher learning.[22] Their governance is unique and has no counterpart in the commercial business models the Act was designed to regulate.[23] Absent a legislative amendment, it would seem that an appropriate method to explore fully the special problems created by the Board's assumption of jurisdiction here would be by rule-making. See *Trustees of Bos-*

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[22] The legislative history of section 2(12) mentions its applicability to lawyers, engineers, and medical personnel. There is no reference to college or university faculty. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 36 (1947). See also *NLRB* v. *Wentworth Institute*, *supra*, at 554-55 (finding the legislative history of the Act inconclusive as to whether Congress specifically intended to exclude nonprofit educational institutions from Board jurisdiction). Prior to its decision in *Cornell University*, 183 N.L.R.B. 329 (1970), the Board had refused to assert jurisdiction over nonprofit educational institutions. *Trustees of Columbia University*, 97 N.L.R.B. 424 (1951).

[23] *Adelphi University*, *supra*, at 648; Kadish, The Theory of the Profession and Its Predicament, 58 A.A.U.P. Bull. 120, 122 (1972); Kahn, *supra*, at 69-74, 84-86. See also *Trustees of Boston University* v. *NLRB*, *supra*, slip op. at 7-8.

ton University v. *NLRB*, *supra*, slip op. at 8; *NLRB* v. *Wentworth Institute*, *supra*, at 556. Both the American Association of University Professors (which has filed an *amicus curiae* brief here) and the Association of American Universities have requested the Board to institute a rule-making proceeding to guide the determination of issues in representation cases involving faculty members of colleges and universities. On July 16, 1971 the Board denied the petition, stating in part, "The Board believes that to adopt inflexible rules for units of teaching employees at this time might well introduce too great an element of rigidity and prevent the Board from adapting its approach to a highly pluristic and fluid set of conditions." Quoted in Kahn, *supra*, at 88.

The Board here has argued that each case must rest on its own facts. However, in its adjudicative process the Board has consistently applied the rigid criteria we have discussed. In any event, in this case the facts compel the conclusion under long established standards that the full-time faculty has managerial status, and as the Supreme Court indicated in *NLRB* v. *Bell Aerospace Co., Division of Textron, Inc.*, *supra*, at 289, the Board is not now free "to read a new and more restrictive meaning into the Act." We find here that the Board, for the reasons given, has applied unjustified, arbitrary standards and therefore we refuse to enforce the Board's order. See *Niagara University* v. *NLRB*, *supra*.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirty-first day of July —, one thousand nine hundred and seventy-eight.

Present:

HON. J. EDWARD LUMBARD

HON. WILLAM H. MULLIGAN

HON. WILLIAM H. TIMBERS
Circuit Judges.

77-4182

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

YESHIVA UNIVERSITY, RESPONDENT

YESHIVA UNIVERSITY FACULTY ASSOCIATION, INTERVENOR.

An application to enforce an order of the National Labor Relations Board.

This cause came to be heard on a certified list of items comprising the record of the National Labor Relations Board and was argued by counsel.

Upon consideration thereof, it is hereby ordered, adjudged and decreed that the application for enforcement be and it hereby is denied in accordance with the opinion of this court with costs to be taxed against the petitioner.

A. DANIEL FUSARO,
Clerk

By /s/ Sara Piovia
Deputy Clerk

APPENDIX C

JPM

D—2484
New York, N.Y.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 2—CA—14697

YESHIVA UNIVERSITY

and

YESHIVA UNIVERSITY FACULTY ASSOCIATION

DECISION AND ORDER

Upon a charge filed on February 4, 1977, by Yeshiva University Faculty Association, herein called the Union, and duly served on Yeshiva University, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 2, issued a complaint and notice of hearing on February 22, 1977, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on or about December 29, 1976, following a Board election in Case 2—RC—16662 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate; [1] and that, commencing on or about January 7, 1977, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On March 7, 1977, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On March 21, 1977, and on April 1, 1977, respectively, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment and issuance of Decision and Order and a further petition for summary judgment and Decision and Order. Subsequently, on April 8, 1977, the Respondent filed a statement in opposition to petition for summary judgment. On April 12, 1977, the Board issued an

[1] Official notice is taken of the record in the representation proceeding, Case 2—RC—16662, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA, as amended.

order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause entitled "Further Statement in Opposition to Petition for Summary Judgment and Response to Notice To Show Cause."

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, opposition to the Motion for Summary Judgment, and response to the Notice To Show Cause, the Respondent essentially attacks the Board's unit determination in the underlying representation case and, accordingly, the validity of the certification of the Union as the exclusive bargaining representative of the employees in that unit. The General Counsel contends, in effect, that the denials and affirmative defenses set forth in the Respondent's answer raise no issues which have not been litigated and determined by the Board in the prior representation proceeding, Case 2—RC—16662, and that there are no issues requiring a hearing. We agree with the General Counsel.

Our review of the record herein, including that in the representation proceeding, Case 2—RC—16662,

shows that, following a hearing before a Board Hearing Officer on the status of certain faculty personnel, the case was transferred to the Board for decision. Respondent and the Union filed with the Board briefs in support of their respective positions. On December 5, 1975, the Board issued a Decision and Direction of Election [2] in which it concluded, *inter alia*, that the unit consisting of all full-time faculty members, excluding part-time faculty and certain other faculty classifications, was appropriate, as they were neither supervisors nor managerial employees but professional employees. Accordingly, the Board directed an election in that unit. An election by mail and manual balloting was conducted between November 16 and December 20, 1976. A majority of the eligible voters cast ballots for the Union and, in the absence of objections to conduct affecting the election results, the Union was certified by the Regional Director on December 29, 1976.

In its submissions, Respondent contends that the Board's Decision and Direction of Election disregarded uncontroverted evidence, countenanced abnormally high supervisory ratios, applied an unjustified "ultimate authority" and "shared responsibility" rationale and a baseless quantitative 50-percent test to the qualitative definition of supervisor embodied in Section 2(11), and ignored the principles dealing with managerial employees enunciated in *Textron*,[3] in

[2] 221 NLRB 1053.

[3] *N.L.R.B.* v. *Bell Aerospace Company, Division of Textron, Inc.*, 416 U.S. 267 (1974).

ruling, *inter alia*, that all full-time faculty members, department chairmen and related titles, committee members and other miscellaneous supervisors are not managerial or supervisory personnel under Section 2(11) but are professional employees under Section 2(12) of the Act. Further, Respondent alleges that, by permitting the participation of supervisory and managerial personnel in the election, the Board itself destroyed the laboratory conditions thereof; that the Board allowed the extent of organization to be controlling when it excluded regular part-time faculty members from the appropriate bargaining unit in violation of Section 9(c)(5) of the Act; that by so excluding the regular part-time faculty members without first conducting a rulemaking proceeding pursuant to the Administive Procedure Act the Board violated its obligations under that act; and that the Board abused its discretion by including terminal faculty members in the bargaining unit. We find no merit in these contentions.

Except for the contention that the Board should have engaged in rulemaking before excluding from the unit regular part-time faculty, Respondent is attempting to raise again and relitigate issues which were, or could have been, raised and litigated in the representation case [4] and this it may not do. Further,

[4] The Board found that the arguments raised by Respondent in the representation case proceeding were similar to those considered and rejected by the Board in several earlier decisions. *Northeastern University*, 218 NLRB 247 (1975); *University of Miami*, 213 NLRB 634 (1974); *New York Univer-*

we find no merit in Respondent's contention that the Board contravened the Administrative Procedure Act by excluding regular part-time faculty members from the appropriate unit without first conducting a rule-making proceeding pursuant thereto. It is well established that adjudicated cases may serve as precedent, and that the Board may apply those precedents [5] to the parties in an adjudicatory proceeding.[6]

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[7]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that

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sity, 205 NLRB 4 (1973); *Adelphi University*, 195 NLRB 639 (1972); *Fordham University*, 193 NLRB 134 (1971); *C. W. Post Center of Long Island University*, 189 NLRB 904 (1971); *Yeshiva University*, 221 NLRB 1053, 1054, fns. 5 and 6 (1975).

[5] *New York University, supra*, and *University of San Francisco*, 207 NLRB 12 (1973).

[6] *N.L.R.B.* v. *Wyman-Gordon Co., et al.*, 394 U.S. 759 (1969).

[7] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.[8] We shall, accordingly, grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of the Respondent

Respondent is a private institution of higher education chartered under the State of New York. It maintains offices and educational facilities in the city and State of New York, Borough of Manhattan. During the past year, a representative period, Respondent derived gross revenues from its operations in excess of $1 million from sources other than donations and restricted contributions, of which amounts in

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[8] Respondent has denied the allegations of the complaint concerning the request and refusal to bargain. Attached to the General Counsel's further petition are Exhs. K, L, and M which show that by letter dated January 5, 1977, received on January 7, 1977, the Union requested Respondent to bargain and that previously, by letter dated December 27, 1976, Respondent expressed its intention to obtain legal review of the Union's certification in the courts. The contents of these exhibits which are uncontroverted establish, and the Board finds, that on January 7, 1977, the Union requested and Respondent refused to bargain. See *Paramount General Hospital, Inc.*, 223 NLRB 1017, 1019, fn. 8 (1976).

excess of $50,000 were derived from sources located outside the State of New York.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Yeshiva University Faculty Association is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time faculty members appointed to the University in the titles of professor, associate professor, assistant professor, instructor, or any adjunct or visiting thereof, department chairmen, division chairmen, senior faculty and assistant deans who are employed by the Employer at its Campus, exclusive of faculty at Albert Einstein College of Medicine, Sue Golding Graduate School of Medical Sciences, Yeshiva High School, Rabbi Isaac Elchanan Theological Seminary, Cantorial Training Institute, Community Service Division, and Sephardic Community Activities Program; part-time faculty; lecturers; principal investigators; deans, acting deans and directors; faculty whose initial and subsequent appointment is subject to special funding derived in the main from non-University funds or whose initial or subsequent appointment is in connection with special projects; the Registrar; visiting professors (with effective faculty appointments at other academic institutions); librarians; research assistants; research associates; emeritus faculty not actively engaged in teaching at the University; officers of the University; all other administrative and support personnel; guards, and all supervisors as defined in Section 2(11) of the Act.

2. The certification

On December 20, 1976, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 2, designated the Union as their representative for the purpose of collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on December 29, 1976, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about January 7, 1977, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about January 7, 1977, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.[9]

Accordingly, we find that Respondent has, since January 7, 1977, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to

[9] See fn. 8, *supra*.

labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Yeshiva University is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Yeshiva University Faculty Association is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time faculty members appointed to the University in the titles of professor, associate professor, assistant professor, instructor, or any adjunct or visting thereof, department chairmen, division chairmen, senior faculty and assistant deans who are employed by the Employer at its Campus, exclusive of faculty at Albert Einstein College of Medicine, Sue Golding Graduate School of Medical Sciences, Yeshiva High School, Rabbi Isaac Elchanan Theological Seminary, Cantorial Training Institute, Community Service Division, and Sephardic Community Activities Program; part-time faculty; lecturers; principal investigators; deans, acting deans and directors; faculty whose initial and subsequent appointment is subject to special funding derived in the main from non-University funds or whose initial or subsequent appointment is in connection with special projects; the Registrar; visiting professors (with effective faculty appointments at other academic institutions); librarians; research assistants; research associates; emeritus faculty not actively engaged in teaching at the University; officers of the University; all other administrative and support personnel;

guards, and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since December 29, 1976, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about January 7, 1977, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Rela-

tions Board hereby orders that Respondent, Yeshiva University, New York, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Yeshiva University Faculty Association as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time faculty members appointed to the University in the titles of professor, associate professor, assistant professor, instructor, or any adjunct or visting thereof, department chairmen, division chairmen, senior faculty and assistant deans who are employed by the Employer at its Campus, exclusive of faculty at Albert Einstein College of Medicine, Sue Golding Graduate School of Medical Sciences, Yeshiva High School, Rabbi Isaac Elchanan Theological Seminary, Cantorial Training Institute, Community Service Division, and Sephardic Community Activities Program; part-time faculty; lecturers; principal investigators; deans, acting deans and directors; faculty whose initial and subsequent appointment is subject to special funding derived in the main from non-University funds or whose initial or subsequent appointment is in connection with special projects; the Registrar; visiting professors (with effective faculty appointments at other academic institutions); librarians; research assistants; research associates; emeritus faculty not actively engaged in teaching at the University; officers of the University; all other administrative and support personnel; guards, and all supervisors as defined in Section 2(11) of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its offices and educational facilities in New York, New York, copies of the attached notice marked "Appendix."[10] Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's representative, shall be posted by Respondent immediately

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[10] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. August 24, 1977

Howard Jenkins, Jr., Member

John A. Penello, Member

Betty Southard Murphy, Member

[SEAL]

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Yeshiva University Faculty Association as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time faculty members appointed to the University in the titles of professor, associate professor, assistant professor, instructor, or, any adjunct or visiting thereof, department chairmen, division chairmen, senior faculty and assistant deans who are employed by the Employer at its Campus, exclusive of faculty at Albert Ein-

stein College of Medicine, Sue Golding Graduate School of Medical Sciences, Yeshiva High School, Rabbi Isaac Elchanan Theological Seminary, Cantorial Training Institute, Community Service Division, and Sephardic Community Activities Program; part-time faculty; lecturers; principal investigators; deans, acting deans and directors; faculty whose initial and subsequent appointment is subject to special funding derived in the main from non-University funds or whose initial or subsequent appointment is in connection with special projects; the Registrar; visiting professors (with effective faculty appointments at other academic institutions); librarians; research assistants; research associates; emeritus faculty not actively engaged in teaching at the University; officers of the University; all other administrative and support personnel; guards, and all supervisors as defined in Section 2(11) of the Act.

YESHIVA UNIVERSITY
(Employer)

Dated ——— By ———————————
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 36th Floor—Federal Building, 26 Federal Plaza, New York, New York 10007, Telephone 212—264-0360.

APPENDIX D

Yeshiva University and Yeshiva University Faculty Association, Petitioner. Case 2—RC—16662

December 5, 1975

DECISION AND DIRECTION OF ELECTION

BY CHAIRMAN MURPHY AND MEMBERS JENKINS AND PENELLO

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Clifford P. Chaiet. Pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, and by direction of the Regional Director for Region 2, this case was transferred to the National Labor Relations Board for decision. Thereafter, the Employer and the Petitioner filed briefs in support of their respective positions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the rulings of the Hearing Officer made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. Yeshiva University, also referred to herein as the Employer or the University, is a private institution of higher education chartered under the laws of the State of New York. Its offices and educational facilities are located on four campuses in New York, New York.[1] During the past year the University derived gross income in excess of $1,000,000 from sources other than donations and restricted contributions. At least $50,000 of this income was derived directly from sources located outside the State of New York. Based on the foregoing stipulated facts, we find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the policies of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.[2]

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[1] The University is composed of 12 schools and colleges and a number of programs. These are as follows: Yeshiva College, Bernard Revel Graduate School (whose summer session is known as the Harry Fischel School), James Striar School of General Jewish Studies, Wurzweiler School of Social Work, Stern College for Women, Erna Michael College for Hebraic Studies, Teachers Institute for Women, Ferkauf Graduate School of Humanities and Social Sciences, Belfer Graduate School of Science, Albert Einstein College of Medicine, Sue Golding Graduate School of Medical Sciences, Rabbi Isaac Elchanan Theological Seminary, Community Service Division, Cantorial Training Institute, Sephardic Studies Program, Yeshiva Program, and Sephardic Community Action Program.

[2] The Employer took the position that the Petitioner and its component bodies, the Faculty Associations of the Belfer Graduate School of Science, the Ferkauf Graduate School of

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The Yeshiva University Faculty Association herein referred to as the Petitioner or YUFA seeks to represent a unit including all faculty appointed to the University in the titles of professor, associate professor, assistant professor, instructor with a full-time teaching load or the equivalent, excluding part-time faculty, lecturers, faculty of the Albert Einstein College of Medicine, the Sue Golding Graduate School of Medical Sciences, the Yeshiva High School, the Rabbi Isaac Elchanan Theological Seminary, the Cantorial Training Institute, the Community Service

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Humanities and Social Sciences, and the Yeshiva College, were formed by supervisory employees of the University thereby taking the organization outside of the definition of a labor organization as stated in the Act. However, it is clear from the record that the Petitioner is an organization "in which employees participate" and which exists for the purpose of bargaining collectively with the Employer. The Petitioner thus meets the definition of "labor organization" set forth in Sec. 2(5) of the Act. Further, it is clear that the Petitioner was organized primarily by faculty found, *infra*, to be non-supervisory employees. The participation in the organizational effort by three principal investigators, found to be supervisors, *infra*, does not remove Petitioner from the definition of a labor organization in light of substantial employee participation in the Petitioner. *Directors Guild of America, Inc. (Association of Motion Picture & Television Producers, Inc.)*, 198 NLRB 707 (1972). We also note that questions relating to showing of interest are not litigable in representation proceedings. *Tappan Division of Tappan Incorporated*, 193 NLRB 989 (1971).

Division, the Sephardic Community Activities Program, the James Striar School, the Teachers Institute for Women, and the Sephardic Studies Program, librarians, research associates, research assistants, visiting faculty whose employment at the University is for a fixed 1-year period and who are faculty members at another academic institution, emeritus faculty who are not actively engaged in teaching at the University, faculty whose initial and subsequent appointment is subject to special funding derived in the main from nonuniversity funds, deans and acting deans, directors, the Registrar, and other officers of the University.[3]

The Employer initially takes the position that all faculty members of the University are managerial or supervisory personnel and are therefore not employees within the meaning of the Act. In the alternative, the Employer seeks a unit of all full-time and regular part-time faculty members.[4] The Employer would exclude from this unit as managerial and/or supervisory, department chairmen and their concomitants,

[3] At the close of the hearing, the Petitioner indicated that it did not seek to represent faculty at the University's Teachers Institute for Women, herein referred to as Teachers, inasmuch as the professors at Teachers labeled "full-time" by the University do not hold faculty appointments but are actually part-time faculty.

[4] Under the University's definition, part-time (that is, half the normal full-time load of 12 hours) would include the faculty members teaching at least 6 hours in the semester in which the election is held and in both semesters of the preceding 3 academic years.

members of the University's committee on academic priorities and resource allocation and the faculty review committee, assistant deans, principal investigators of research and training grants, faculty who have as of date of the election, received notice that their appointment will be terminated or will not be renewed, have notified the University that they intend to resign, or have reached the University's mandatory retirement age. The Employer would not exclude, as would the Petitioner, full-time faculty whose appointments are subject to funding from research grants or from other nonuniversity sources, faculty with the rank of "lecturer," and faculty at Teachers. The Employer does not disagree with the other exclusions sought by the Petitioner.

In contending that no faculty bargaining unit can be appropriate because all faculty members—by virtue of their group participation in faculty governance—are supervisory or managerial and are, thereby, not employees within the meaning of the Act, the Employer requests that the Board reconsider its previous decisions on this issue.[5] The Employer urges, further, that, in any event, the Board reach a contrary result herein on the ground that this particular faculty has authority which is different from and more extensive than the authority vested in the faculties which were the subjects of the earlier cases.

[5] *Northeastern University*, 218 NLRB No. 40 (1975); *University of Miami*, 213 NLRB 634 (1974); *Adelphi University*, 195 NLRB 639 (1972); *Fordham University*, 193 NLRB 134 (1971); and *C. W. Post Center of Long Island University*, 189 NLRB 904 (1971).

We find from our examination of the record, however, that the role and authority of the faculty herein with respect to hiring, promotion, salary increases, the granting of tenure, and other areas of governance are not significantly different from what they were in the cited cases,[6] wherein the same arguments were rejected. At Yeshiva University, faculty participation in collegial decision making is on a collective rather than individual basis, it is exercised in the faculty's own interest rather than "in the interest of the employer,"[7] and final authority rests with the board of trustees. As in the earlier decisions, we find that the faculty members are professional employees under the Act who are entitled to vote for or against collective-bargaining representation.

Unit Composition

Part-time faculty: The Petitioner would exclude, while the Employer would include, part-time faculty members. For the reasons set forth in our decisions in *New York University, supra,*[8] and *University of*

[6] See fn. 5, *supra.* See also *New York University,* 205 NLRB 4 (1973).

[7] Sec. 2(11) of the Act.

[8] The Employer argues that application of the factors relied on by the Board in *New York University* requires the inclusion of regular half-time faculty members here. However, while there is some involvement of part-time faculty in issues of curriculum and standards in the Jewish Studies Programs, for the most part the part-time faculty, by both regulation and practice, play a significantly lesser role in student and faculty affairs at the University than do full-time faculty. The record herein amply demonstrates a lack of mutuality of interest between the part-time and full-time faculty at Yeshiva University similar to that requiring exclusion of part-time faculty in *New York University* and *University of San Francisco.*

San Francisco, 207 NLRB 12 (1973), we shall exclude part-time faculty from the bargaining unit found appropriate herein.[9]

Members of committee on academic priorities and resource allocation and faculty review committee: The Employer contends that members of these committees have substantial managerial and supervisory powers and must, therefore, be excluded from the unit. The record, however, demonstrates that the faculty members on each of the two committees are *elected by the faculty* and serve as representatives of the faculty rather than of management. As we have found, *supra,* authority exercised by the faculty as a group on the basis of collective discussion and consensus is not sufficient to render the individual members of

[9] The record indicates that there are currently no faculty members at Teachers holding full-time appointments with the University; rather the faculty listed by Teachers as teaching a full 12-hour load are, in fact, part-time faculty without University appointment. Accordingly, such part-time faculty members are not eligible to vote in the election. However, as there is no basis for excluding from the unit any full-time faculty members at Teachers should any such University appointments be made in the future, faculty at Teachers holding full-time appointments with the University will be included in the unit. As the faculty in the title "lecturer" work part-time, employees in that classification are excluded from the unit as part-time employees.

such group supervisors within the meaning of the Act.[10] We therefore find that the several members of the two above-named committees are not supervisory or managerial representatives of the University, and we shall include them in the bargaining unit.

Department chairmen, division chairmen, and senior faculty: The Employer contends that the department chairmen and their concomitants are managerial and/or supervisory employees and, as such, must be excluded from the bargaining unit. The Petitioner asserts that the department chairmen and senior faculty do not qualify as supervisory or managerial and seeks their inclusion in the unit.

As in the *University of Miami, supra*, department chairmen are generally appointed by the dean of their school or college, after consultation with the departmental faculty concerned—whose recommendation is usually, although not always, followed. Indeed, at Belfer, Revel, Ferkauf, and Yeshiva College, the department or division chairmen are actually *elected* by the faculty of their respective departments or divisions. Further, department chairmen have been subject to recall several times by their faculty membership.

The chairmen have regular faculty appointments and teach classes. It appears from the record that they do not receive any extra pay or stipend as chairmen, but they do have their teaching obligations somewhat reduced in many cases.

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[10] *Adelphi University*, 195 NLRB 639, 648 (1972); *C. W. Post Center of Long Island University, supra.*

Belfer's Dean Koman testified that department chairmen at Belfer recommend faculty salaries to the dean but such salaries are subject to approval by the vice president of the University, and individual faculty members can and have gone directly to the president of the University to adjust the recommended figures. The recommendations, arrived at by a consensus of the department members, as to hiring, firing, or granting tenure are relayed through the chairmen.

The dean at Erna Michael testified that when a new faculty member is needed, he approaches the "senior professor," if there is one for the subject area involved, or a number of other faculty people if there is no senior professor, and asks if they know of anyone. Another source is letters or requests for positions received by the dean or "any other of the well-known members of the faculty." According to the dean's testimony, if a particular application looks good or if a faculty member has someone in mind, the dean asks the faculty member to interview the person in question; about 50 percent of the time the dean also participates in the initial paper screening and sometimes participates in the interviews.

Rabbi Besdin, Director of Striar, testified that the two department chairmen were chosen with the consensus of faculty and that other faculty, as well as department chairmen, may play a consultative role regarding hiring.

The testimony of Dean Gittler of Ferkauf indicates that recommendations on hiring come from the consensus of the department through the chairman.

Wurzweiler has no "chairmen" or "senior professors." The Employer argues that the convenors, the chairman of the admissions committee, the field instruction coordinator, and the chairman of the doctoral committee perform many of the supervisory and managerial duties of the school. The record indicates that the primary duties of these personnel involve, respectively, coordination of teaching approaches in each division, direction of students' admission, selection of social agencies for placement of students (a responsibility delegated by the faculty), and establishment of requirements for the doctorate degree.

Rabbi Landman of Revel testified that the department chairman's recommendations on the hiring of full-time and part-time faculty members appear to be arrived at by consensus of the department faculty.

The testimony of Dean Mirsky of Stern indicates that he has consulted with Stern's chairmen and generally obtained the approval of the department chairmen before submitting recommendations to the president with regard to the hiring of new employees and the reappointment of faculty. Dean Mirsky has, however, acted contrary to a department chairman's recommendation, and the chairmen do not have the authority to effectuate a reappointment denied by the dean.

According to Dean Bacon of Yeshiva College, the division chairmen, who are elected by the faculty of the particular division, make up the advisory council to the dean. Collectively they deliberate and recommend, through the chairman of the division involved, action on such matters as promotions and sabbaticals. The senior faculty at Yeshiva College, faculty members with the most seniority in each subject area,[11] review applicants for faculty positions and recommend the most outstanding to Dean Bacon, who makes an independent review of the applicants' qualifications before referring such recommendations to the president.

As with the final authority to appoint and reappoint, exclusive authority for the granting of tenure is vested in the president. The record does not indicate that department chairmen play a significant role in this process. The departments at Belfer collectively make tenure recommendations which Dean Koman passes on to the president; the dean at Wurzweiler, individually, makes the recommendations to the president. At Ferkauf, a council of all tenured faculty considers award of tenure, but the dean chairs the council and retains, and has exercised, veto power over its recommendations.

The Board has considered many factors in determining whether department chairmen should be included in a unit of faculty. One of the crucial factors is the role of the chairmen in faculty personnel decisions such as hiring, firing, and other changes of status. In appropriate cases where the chairman's authority has been effectively diffused among the de-

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[11] The subject areas at Yeshiva College are organized in broad "divisions."

partment faculty pursuant to the principle of collegiality, the Board has included the chairmen.[12] The record in the present case demonstrates that the department chairmen, division chairmen, and senior faculty at Yeshiva fall within this qualification.

On the record before us, it appears that, although they have certain formal responsibilities with respect to decisions on such matters as appointment, promotion, and tenure, the department chairmen and their concomitants act primarily as instruments of the faculty in these matters. The department chairmen, in these respects, therefore stand largely on the same footing as the faculty, from whom they receive their authority. All major recommendations, including hiring, appear to be done on a collegial basis. Further, as previously noted, the department chairmen at Yeshiva receive no additional remuneration for assuming the position of chairman.

Accordingly, we find that the department chairmen, division chairmen, and senior faculty are neither supervisors nor managerial employees and shall include them in the unit.[13]

Assistant deans: The Petitioner seeks to include in the unit the two assistant deans, Patt at Belfer and Wischnitzer at Yeshiva College. The Employer would exclude them as supervisory and/or managerial. It

[12] *Northeastern University, supra.*

[13] *Northeastern University, supra; Fordham University,* 214 NLRB No. 137 (1974); *University of Miami, supra; New York University, supra.*

does not appear from the record that they are ever delegated the supervisory authority possessed by the deans under whom they serve.[14]

Both of the assistant deans hold faculty appointments, are paid in the faculty classifications and fulfill teaching responsibilities within the academic departments with which they are affiliated. Further, the assistant dean at Belfer has been elected by the faculty to serve as faculty representative on several committees.

Based on the foregoing we find that the assistant deans are neither supervisors nor managerial employees.[15] Accordingly, we shall include them in the bargaining unit herein.[16]

Terminal faculty members: As noted, *supra*, the Employer seeks to exclude faculty resignees, terminees, and retirees.[17] Petitioner seeks inclusion of these

[14] Although Dean Komar testified that Assistant Dean Patt "replaces" him during Komar's absences, there is no testimony indicating that during such time Patt was empowered to make any determinations with regard to hiring, firing, promotions, tenure, or any other change in status or to exercise any other supervisory or managerial function.

[15] *University of Miami, supra.*

[16] Chairman Murphy is of the view that the record in this case is insufficient to make a determination as to whether the assistant deans are supervisors within the meaning of the Act. Accordingly, the Chairman would vote the two assistant deans by challenged ballot.

[17] Upon notice of resignation or termination, the full-time faculty member is expected to continue his employment through and until the end of the academic year. Further, terminations may be appealed, and a faculty member may continue beyond the retirement age on a year-to-year basis with the president's permission.

faculty members. The Employer, recognizing that in previous university cases the Board has uniformly included such employees in faculty bargaining units,[18] urges the Board to reconsider its holding on this issue. After due consideration, we have decided to adhere to our longstanding position with regard to terminal employees, since while their employment continues they have a substantial community of interest with their colleagues. Therefore, faculty members who have received notice that their appointments will be terminated or will not be renewed, have notified the University that they intend to resign, or have reached the University's mandatory retirement age will be eligible to vote in the election herein provided that they are still employed as faculty members at the time of the election.

Principal investigators: The Petitioner seeks to include in the unit principal investigators. The Employer argues that they possess supervisory and managerial authority and must be excluded.

Principal investigators are faculty members who prepare grant proposals and administer the projects once funds have been awarded by government or private agencies.

The principal investigator is responsible, subject only to approval of the deans and University administration, for the hiring of full-time and part-time members of the Yeshiva faculty, research associates,

[18] See *Fordham University, supra; New York University, supra; Manhattan Collge,* 195 NLRB 65 (1972).

research assistants, clerical and other support personnel for work on his project. The record shows that the principal investigator prepares the budget for a grant and sets salaries within broad University guidelines. The record also demonstrates that the principal investigators have the authority to reprimand and terminate the services of all grant employees. Day-to-day supervision of grant employees is also carried out solely by the principal investigator.[19] The principal investigator adjusts the complaints and grievances of the grant employees.

As in *Northeastern University, supra,* all of the employees who work on grants and contracts under the direction of a principal investigator are employees of the University and not of the granting agency. These employees are paid by Yeshiva and receive the fringe benefits available to other employees. Yeshiva makes payroll deductions for grant employees similar to the deductions made for other employees.

In the instant case, as in *Rensselaer Polytechnic Institute,*[20] the employees supervised by the principal investigators are employees of the University, and, therefore, the principal investigators herein are super-

[19] While it is difficult to determine the amount of time actually spent by the principal investigators in grant supervision, the University allocates 50 percent of a principal investigator's time for administration of grants. Further, testimony indicates that "absolutely more than half of the time" has been spent by a principal investigator in the supervision of nonunit employees.

[20] 218 NLRB No. 220 (1975).

visors in their relationship to their Employer.[21] Therefore, we find them to be supervisors within the meaning of the Act and exclude them from the unit found appropriate herein.

Full-time faculty whose appointment is subject to special funding and derived from non-University funds: Contrary to the Employer, the Petitioner would exclude the two faculty members who have been hired primarily to perform research activities under a research grant.

Although listed by the University as full-time faculty (one under the title "Research Assistant Professor") neither of the two faculty members in this category have appointment letters from the president, and they are ineligible for tenure, sabbatical leave, or other perquisites enjoyed by full-time faculty. Further, it appears that their salaries are determined under the grant proposals upon which their employment is dependent.

Under these circumstances, it appears that these two faculty members whose appointment is subject to special funding have a community of interest with the research associates and research assistants, stipulated out of the unit by the parties, rather than with the appointed full-time faculty herein. Accordingly, we shall exclude them from the unit.

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[21] In *Fordham, supra,* and *New York University, supra,* the principal investigators were found not to be supervisors in their relationship to their employers and were included in the unit. However, in both cases, the employees hired by them were not and did not become employees of the university.

In accordance with the above, we find that the following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time faculty members appointed to the University in the titles of professor, associate professor, assistant professor, instructor, or any adjunct or visiting thereof, department chairmen, division chairmen, senior faculty and assistant deans, but excluding faculty at Albert Einstein College of Medicine, Sue Golding Graduate School of Medical Sciences, Yeshiva High School, Rabbi Isaac Elchanan Theological Seminary, Cantorial Training Institute, Community Service Division, and Sephardic Community Activities Program; part-time faculty; lecturers; principal investigators; deans, acting deans and directors; faculty whose initial and subsequent appointment is subject to special funding derived in the main from non-University funds or whose initial or subsequent appointment is in connection with special projects; the Registrar; visiting professors (with effective faculty appointments at other academic institutions); librarians; research assistants; research associates; emeritus faculty not actively engaged in teaching at the University; officers of the University; all other administrative and support personnel; guards, and supervisors as defined in the Act.

[Direction of Election and *Excelsior* footnote omitted from publication.]

APPENDIX E

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means—

(a) any employee engaged in work (1) predominately intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion in judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of higher specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 * * * ;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) * * * .

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